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In the Supreme Court of the United States

OCTOBER TERM, 1982

PUBLIC SERVICE COMPANY OF INDIANA, INC.,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and ANNE M. GORSUCH,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI

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QUESTION PRESENTED FOR REVIEW

When the United States Environmental Protection Agency disapproves an integral portion of a regulation submitted by the State as a revision to its State Implementation Plan under the Clean Air Act, is the remaining portion of the regulation enforceable by the Agency if it is neither:

(1) Adopted by the State as a state regulation; nor

(2) Promulgated as a federal regulation pursuant to the provisions of the Act?

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and ANNE M. GORSUCH,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the case of *Public Service Company of Indiana, Inc., Plaintiff-Appellant, v. United States Environmental Protection Agency and Douglas M. Costle, Defendants-Appellees,* No. 81-1241.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 682 F.2d 626, and is set forth in the Appendix to this Petition ("Appendix") at A–3. The opinion of the District Court is reported at 509 F. Supp. 720, and is set forth in the Appendix at A–37.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered June 25, 1982. (A–51). The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1) and 2101(c) (1976).

STATUTES AND REGULATIONS INVOLVED

This case involves the following statutes and regulations, the pertinent texts of which are set forth in the Appendix:

1. The Clean Air Act, 42 U.S.C. §§ 7401-7626 (Supp. IV 1980); pertinent portions set forth in Appendix are 42 U.S.C. §§ 7401 (A–52), 7410 (A–52), and 7413 (A–68) (Supp. IV 1980) and 42 U.S.C. § 1857h–5 (1976). (A–90).

2. Indiana air pollution control regulation, APC–3, "Smoke and Other Visible Emissions," *1969 Additions and Revisions to Rules and Regulations (Indiana)* (1969 ed.) 4, 11 (referred to herein as "1972 APC–3"). (A–93).

3. Indiana air pollution control regulation, APC–3, "Visible Emissions and Malfunctions," 325 IND. ADMIN. CODE 1-3 (1979)(referred to herein as "1974 APC–3"). (A–94).

4. 40 C.F.R. § 52.776(c) (1981). (A–93).

STATEMENT OF THE CASE

Petitioner Public Service Company of Indiana ("PSI") is a regulated public utility engaged in the generation, transmission, distribution and sale of electric energy. The respondents are the United States Environmental Protection Agency and its Administrator Anne M. Gorsuch[1] (collectively, "EPA", "Agency" or "Administrator").

Approval of Indiana's State Implementation Plan.

In January 1972, Indiana submitted to EPA under the Clean Air Act (the "Act"), 42 U.S.C. §§ 7401-7626 (Supp. IV 1980), a State Implementation Plan ("SIP") to meet national air quality standards within the borders of Indiana. The SIP included, *inter alia*, an Indiana air pollution control regulation called "APC–3" ("1972 APC–3") which limited to 40% opacity the "smoke" from "any combustion installation." *1969 Additions and Revisions to Rules and Regulations (Indiana)* 11 (A–94). 1972 APC–3 was approved by EPA as part of Indiana's SIP on May 31, 1972, 37 Fed. Reg. 10,863-65 (1972) (A–116-122), and thereby became federally enforceable under Sections 110(d) and 113 of the Act. 42 U.S.C. §§ 7410(d), 7413 (Supp. IV 1980).

Proposed Revision of Indiana's SIP.

During 1974, the Indiana Air Pollution Control Board promulgated a number of regulations, including a new regulation designated APC–3 ("1974 APC–3"). 325 IND. ADMIN. CODE 1-3 (1979) (A–94). On November 8, 1974, 1974 APC–3 was submitted to EPA for approval under Section 110(a)(3)(A) of the Act, 42 U.S.C. § 7410(a)(3)(A) (Supp. IV 1980), as a revision of Indiana's SIP. 40 C.F.R. § 52.770(c)(14) (1981); 40 Fed. Reg. 19,210 (1975) (A–153-4). In promulgating 1974 APC–3 and submitting it for approval as a revision, the State was not

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[1] Pursuant to Rule 40.3 of this Court, Anne M. Gorsuch is substituted for Douglas M. Costle, former Administrator of the United States Environmental Protection Agency, who was a party in the case before the Court of Appeals.

acting in response to any finding and notification by EPA pursuant to 42 U.S.C. §§ 7410(a)(2)(H), 7410(c)(1)(C) (Supp. IV 1980), that 1972 APC–3 was inadequate to achieve national air quality standards or was otherwise not in compliance with the Act.

As stated by EPA in its public notice of receipt of the proposed revisions, 1974 APC–3 amended 1972 APC–3 "in its entirety." 40 Fed. Reg. 19,210 (1975) (A–154). In particular, Section 1 of 1974 APC–3 substantially expanded the coverage of 1972 APC–3 to "other visible emissions" in addition to "smoke" and to "any equipment" rather than just "any combustion installation." The same sentence of Section 1 of 1974 APC–3 that expanded its coverage also, unlike 1972 APC–3, limited the application of the opacity restrictions to those emissions occurring "for more than a cumulative total of fifteen minutes in a 24-hour period."[2]

EPA announced its decision on 1974 APC–3 by order dated October 21, 1975, and published October 28, 1975:

> APC–3 of Indiana's Air Pollution Control Regulations (visible emission limitation) is disapproved insofar as the phrase "for more than a cumulative total of 15 minutes in a 24-hour period" will interfere with attainment and maintenance of particulate standards.

40 Fed. Reg. 50,033 (1975) (A–165) (subsequently codified at 40 C.F.R. § 52.776(c) (1981) (A–93). As interpreted by EPA and the Court of Appeals, that order had the effect of approving and making legally enforceable 1974 APC–3's expansion of coverage to all "visible emissions" rather than just "smoke" and "any equipment" rather than just "any combustion installation" while, at the same time, disapproving and deleting that portion of 1974 APC–3 which permitted such emissions for up

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[2] "Sec. 1. Limitation. No person shall operate any equipment so as to produce, cause, suffer, or allow smoke or other visible emissions in excess of 40 per-cent opacity . . . for more than a cumulative total of fifteen minutes in a 24-hour period . . . ." 325 IND. ADMIN. CODE § 1-3-1 (1979) (A–95).

to 15 minutes per day. *Public Service Company of Indiana, Inc.* v. *EPA*, 682 F.2d 626, 638 (7th Cir. 1982) (A–26).[3]

EPA's resulting more stringent regulation, restricting all emissions in excess of 40% opacity, was never the subject of public hearings, either by Indiana or EPA. Before its October 21, 1975 order, EPA published no notice of intent to adopt, by selectively disapproving the fifteen-minute limitation or otherwise, a more stringent regulation than Indiana had submitted for approval. See 40 Fed. Reg. 19,210-11 (1975) (A–153-159). EPA never subsequently promulgated the resulting regulation as a federal regulation pursuant to Section 110(c)(1) of the Act. 42 U.S.C. § 7410(c)(1) (Supp. IV 1980). Indiana never subsequently adopted EPA's version of 1974 APC–3 as a state regulation and has not enforced EPA's version. *See, e.g.*, 44 Fed. Reg. 2402-03 (1979) (A–166-7); 44 Fed. Reg. 12,461-62 (1979) (A–169-170); and 46 Fed. Reg. 21,790-91 (1981) (A–240-242). The State has twice sought EPA approval of new revisions addressed to the concerns reflected by the disapproved 15-minute exception in 1974 APC–3, but its efforts have been unsuccessful to date. (A–98; A–112).[4]

Enforcement Against PSI.

On January 7, 1980, after having been denied permission to inspect certain PSI facilities, EPA successfully applied *ex*

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[3] Since EPA's October 21, 1975 order does not state anywhere that any portion of 1974 APC–3 was "approved," the actual intent of the order is by no means clear and PSI challenged this interpretation in the courts below. However, PSI is not seeking review of that question in this Petition.

[4] On June 26, 1979, Indiana submitted a revised version of APC–3 to EPA for approval as a revision to Indiana's SIP. 325 IND. ADMIN. CODE 1-3.1 (1980 Supp.) (A–98). On March 27, 1980, EPA published notice of its intent to disapprove that proposed revision. 45 Fed. Reg. 20,432, 36-38 (1980) (A–178, 195-200). Thereafter, on October 6, 1980, Indiana submitted another proposed revision to APC–3. 325 IND. ADMIN. CODE 5 (1982 Cum. Supp.) (A–112). Although EPA has not taken final action on that submission, it published notice of its intent to disapprove on March 3, 1982. 47 Fed. Reg. 9020-21 (1982) (A–244, 251-52).

parte to a United States Magistrate for warrants authorizing inspection of those facilities. The applications were supported by affidavits of an EPA inspector stating, *inter alia*, that he believed the PSI facilities were being operated in violation of 1974 APC–3, as approved in part by EPA in October, 1975.[5] The warrants were executed and the Magistrate denied motions to quash. On March 21, 1980, EPA notified PSI that it had found PSI in violation of EPA's version of 1974 APC–3.

The Action Below.

On April 7, 1980, PSI brought this action against EPA in the District Court for the Southern District of Indiana, asserting jurisdiction under 28 U.S.C. §§ 1331(a), 2201 (Supp. III 1979), and 5 U.S.C. § 702 (1976). The suit sought, *inter alia*, a declaratory judgment that 1974 APC–3 was not federally enforceable because it was not approved in its entirety by EPA, as required by the Act.[6] PSI also requested injunctive relief against further inspections and against use of any evidence obtained by means of the warrants.

After a hearing on PSI's motion for preliminary injunction, which the parties later agreed to treat as a trial on the merits, the District Court entered final judgment for EPA on PSI's claims.[7] In particular, the District Court held that EPA had lawfully approved 1974 APC–3 "with the minute exception of the 15-minute exemption provision . . . ." *Public Service Company of Indiana, Inc.* v. *EPA*, 590 F.Supp 720, 724 (S.D. Ind. 1981) (A–46).

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[5] The District Court concluded and the Seventh Circuit affirmed that probable cause was established on the basis of alleged violations of "1974 APC–3 . . . with the 15-minute exemption excised." 682 F.2d at 638 (A–26).

[6] PSI also challenged the scope of the warrants, but is not seeking review of those questions in this Petition.

[7] The Seventh Circuit characterized the ruling as a "summary judgment for the defendants (EPA)." 682 F.2d at 628 (A–5). Although EPA moved for summary judgment, the District Court's memorandum opinion correctly states that it is based on "a hearing on the merits . . . ." 590 F.Supp at 721 (A–41).

The Court of Appeals for the Seventh Circuit affirmed the District Court in all respects. With respect to PSI's claim that 1974 APC–3 was not enforceable because it was not approved in its entirety by EPA, the appellate court upheld EPA's argument that the Act authorizes EPA to approve and enforce "any portion of a state submitted (SIP) revision" 682 F.2d at 632 (A–13), and, applying that conclusion to the facts of this case, held that "EPA partially approved the 1974 APC–3, disapproving only the 15 minute exemption." *Id.* at 636 (A–22).

REASONS FOR GRANTING THE WRIT

In upholding EPA's claim of statutory authority selectively to approve and enforce the restrictive portions of regulations submitted by the State while simultaneously disapproving and deleting the State's limitations on those same restrictions, the Seventh Circuit has destroyed the balance Congress struck between state and federal regulation of the environment. Since EPA's claimed authority is not conferred on the face of the Act, and its exercise alters the balance struck by the Act's most central features, the Seventh Circuit incorrectly decided a question of national significance.[8]

As this Court has twice determined, Congress intended the Act to give to each state, and not to EPA, the authority to choose its own "mix" of limitations, provided only that the mix chosen is sufficient to achieve minimum national air quality standards. *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60, 79, 86-87 (1975); *Union Electric Co.* v. *EPA*, 427 U.S. 246, 267, 269 (1976). Further, as this Court has also determined, each state and not EPA is given "continuing

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[8] In *Bethlehem Steel Corp. v. EPA*, 638 F.2d 994, 997-998 (7th Cir. 1980), the court did not reach appellant's contention that EPA "has no statutory authority to issue 'partial' approvals of state revisions of its SIP...." The validity of the EPA's "partial approval" technique was probably raised by the facts in *Big Rivers Electric Corp. v. EPA*, 523 F.2d 16, 18 (6th Cir. 1975), *cert. denied*, 425 U.S. 934 (1976), but was not argued to or addressed by the court.

authority to revise [prior] choices about the mix," again provided only that the revised mix is sufficient to achieve minimum national standards. *Train*, 421 U.S.at 87, 98. The mere existence of the authority claimed and upheld by the Court of Appeals' decision significantly impairs the states' "continuing authority" to revise prior policy choices. Further, where, as here, EPA elects to exercise that authority, it will to that same extent implement and enforce *its* policy choice as to the proper mix rather than the state's, in defiance of the Act's fundamental policy. Finally, in circumstances unlike those here, where due to state default EPA *is* authorized to propose federal regulations as ingredients of the overall mix, the Seventh Circuit's decision allows EPA to negate both the state's second opportunity to select means of its own, and the public hearing and rulemaking procedures mandated by the Act.

I. The Act Gives The States Discretion To Choose Any Mix Of Regulations Adequate To Meet National Air Standards And Expressly Provides The Procedures EPA Must Follow If The State Fails To Comply.

The general design of the Act was described by this Court in *Train* v. *National Resources Defense Council, Inc.*, 421 U.S. 60. Under Section 110(a)(1) of the Act, each state is directed to submit to EPA for approval a plan designed to meet national air quality standards within that state's boundaries. 42 U.S.C. § 7410(a)(1) (Supp. IV 1980). That plan must have been "adopted after reasonable notice and hearing" by the state, 42 U.S.C. § 7410(a)(2) (Supp. IV 1980), and must include rules and regulations enforceable by the appropriate state agency. 42 U.S.C. § 7410(a)(2)(D) and (F) (Supp. IV 1980); 40 C.F.R. §§ 51.11, 51.22 (1981).

EPA *must* approve *any* plan the state submits that is adequate to achieve and maintain national air standards and complies with the other general requirements of Section 110(a)(2). 42 U.S.C. § 7410(a)(2) (Supp. IV 1980); *Train*, 421 U.S. at 79. If EPA approves a plan submitted by a state, that plan becomes an "applicable implementation plan," 42 U.S.C. § 7410(d) (Supp. IV 1980), and federally enforceable under Section 113 of the Act. 42 U.S.C. § 7413 (Supp. IV 1980). EPA

has no authority to require that a state plan do more than achieve minimum national standards or to alter any mix of limitations selected by the state which is sufficient to meet that goal. *Train*, 421 U.S. at 79.

If EPA disapproves a plan or a portion thereof submitted by a state, the Administrator has a mandatory duty under Section 110(c)(1) of the Act to "promptly prepare and publish proposed regulations setting forth an implementation plan, or portion thereof" for that state. 42 U.S.C. § 7410(c)(1) (Supp. IV 1980). Even in that event, however, the state is given an additional six months to submit an acceptable alternative. *Id.* If the state fails, EPA must hold public hearings in the affected state before promulgating the Agency's proposed regulations. *Id.* Upon promulgation, such regulations become part of the state's federally enforceable implementation plan, along with any previously approved state regulations. 42 U.S.C. §§ 7410(d), 7413 (Supp. IV 1980).

After a SIP has been approved (or promulgated) by EPA, a state may propose revisions to its own plan in either of two situations: (1) where the state voluntarily elects to alter its previously chosen mix, *see Train*, 421 U.S. at 80, 87; or (2) where EPA has found and notified the state that its SIP is or has become inadequate to meet minimum national standards or otherwise fails to comply with the Act. 42 U.S.C. §§ 7410(a)(2)(H), 7410(c)(1)(C) (Supp. IV 1980). Such revisions must be adopted after notice and hearing in the state, 42 U.S.C. § 7410(a)(3)(A) (Supp. IV 1980), and EPA must approve any such revisions meeting the requirements of the Act. 42 U.S.C. § 7410(a)(2) (Supp. IV 1980); *Train*, 421 U.S. at 80. As this Court emphasized, the Act's "revision section is . . . the mechanism by which the States may obtain approval of their developing policy choices as to the most practicable and desirable methods of restricting total emissions to a level which is consistent with the national ambient air standards." *Id.*

In sum, the Act provides only two methods of adopting federally enforceable emissions limitations: (1) EPA may approve valid regulations promulgated by the state; and (2) EPA may promulgate its own regulations by following the

procedures in Section 110(c)(1). The first is the preferred method; the second may be employed only if the state defaults.

This case presents the question whether the Act was properly construed to allow a third method—whether EPA may blue-pencil integral portions of a state-submitted regulation and enforce the remainder absent either adoption of EPA's version by the state or formal promulgation of EPA's version as a federal regulation pursuant to Section 110(c)(1), and, in particular, whether EPA may do so when the regulation so edited was submitted by the state to revise a valid pre-existing state regulation never found by the Administrator to be inadequate under the Act.

II. Where A State Submits A Regulation As A Revision To A Valid Pre-existing State Regulation, Permitting EPA To Disapprove An Integral Portion While "Approving" And Federally Enforcing The Remainder Serves No Statutory Policy And Seriously Erodes The State's Primary Authority Under The Act.

Indiana's 1974 action in seeking revision of APC–3 was a paradigmatic exercise of the State's "continuing authority to revise choices about the mix of emissions limitations." *Train*, 421 U.S. at 87. On the one hand, the State's version of 1974 APC–3 expanded the coverage of its restrictions to include all visible emissions (having previously been limited to "smoke") and all equipment (having previously been limited to "combustion installations"). On the other hand, Indiana contracted the coverage of its restrictions by granting a 15-minute-per-day exception to both emissions previously covered and those brought within coverage by the same revision.[9]

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[9] Section 1 of 1974 APC–3 is denominated as a "Limitation on emissions", 325 IND. ADMIN. CODE 1-3-1 (1979), and is referred to as such throughout this Petition. Technically, however, it and other opacity limits are properly considered surveillance techniques for detecting violations of actual "emission limitation[s]" as defined by

(Footnote continued on next page)

EPA disapproved the 15-minute exception for emissions previously and newly covered because the State "failed to . . . demonstrat[e]" that the exception "would not result in an interference with attainment and maintenance of the [pertinent] standards." 40 Fed.Reg. 50,033 (1975). Petitioner does not contest that determination. What petitioner does contest is EPA's exercise of claimed authority simultaneously to adopt by selective "approval" and to eliminate by selective "disapproval" portions of the same regulation, thereby expanding the coverage of the resulting regulation beyond the scope of both 1972 APC–3 and 1974 APC–3. The result, of course, is to adopt and enforce EPA's policy choice of a proper mix of emissions limitations, not that of the State of Indiana.

Indiana's version of 1974 APC–3 demonstrates that the State considered the 15-minute exception an integral and substantive part of its decision to revise the "mix" of emissions limitations it had chosen in 1972. If there could be any doubt, it is dispelled by Indiana's subsequent treatment of EPA's edited version of 1974 APC–3. The State has never adopted EPA's version of what EPA says is (and what the Act says must be) the *State's* regulation; the State has refused to enforce it; and the State has twice sought to revise APC–3 since EPA is federally enforcing its version of 1974 APC–3 against Indiana emissions sources. *Supra* at p.5 and n.4.[10]

Section 302(k) of the Act, 42 U.S.C. § 7602(k) (Supp. IV 1980). *See*, 40 C.F.R. § 51.19(c) (1981). Surveillance techniques are required to achieve an adequate SIP, *see id.*, and are frequently more important as a practical matter than "emissions limitations" narrowly defined. They clearly are governed by those provisions of the Act giving the states continuing authority to revise their SIPs, and this Court's analysis in *Train*.

[10] EPA cannot contend (and notably has not contended to date) that the State is required to promulgate and enforce as a State regulation EPA's federal version of Indiana 1974 APC–3. Such a contention would assert that the Agency may via an alternative route enforce against the states an authority EPA conceded it did not have in *EPA* v. *Brown*, 431 U.S. 99 (1977).

In part, the Court of Appeals rejected PSI's argument that EPA may not "partially approve" and enforce 1974 APC–3 because, in that court's view:

> To require the Administrator to disapprove an entire regulation because one provision in it is inconsistent with the requirements of 42 U.S.C. § 7410(a)(2) would unnecessarily curtail the discretion of the states in formulating their SIPs.

682 F.2d at 633 (A–15). But that rationale ignores that under the Act states are always given an opportunity to correct a deficient SIP before federal regulations may be promulgated pursuant to Section 110(c)(1). 42 U.S.C. § 7410(c)(1)(Supp. IV 1980). And it makes no sense at all when, as here, the State voluntarily submitted the regulation *as a revision of a pre-existing state regulation previously approved by EPA and never subsequently found by the Agency to be inadequate under the Act* pursuant to Sections 110(a)(2)(H) and 110(c)(1)(C). 42 U.S.C. §§ 7410(a)(2)(H), 7410(c)(1)(C) (Supp. IV 1980). In that case particularly, the Administrator's authority is and must be limited to approving or disapproving the proposed revision in its entirety if the continuing policy role Congress gave the states is to be preserved.

Denying EPA authority to approve and enforce a portion of a regulation submitted by the state as a revision to a valid pre-existing regulation leaves the states with the primary policy role with respect to the limitations mix. It leaves the states, and not EPA, with the choice whether to:

(1) Continue with the pre-existing regulation;

(2) Develop and submit for approval some new alternative; or

(3) Adopt EPA's version of a minimally adequate new one.

That is the result that Congress intended and this Court affirmed. 42 U.S.C. §§ 7401(a)(3), 7407(a) (Supp. IV 1980); *Train*, 421 U.S. at 79; *Union Electric*, 427 U.S. at 266.

On the other hand, no purpose of the Act is served in allowing the Administrator to exercise the authority claimed

here. While the state is considering which option to choose, the pre-existing SIP, previously approved by the Administrator and never subsequently found to be inadequate, remains in effect. And, of course, consistent with the policy of the Act, that pre-existing SIP has the virtue of having been chosen by the state.

The authority to edit state submitted revisions and to enforce the remaining portions, claimed by EPA and affirmed by the Court of Appeals, erodes the state's primary and continuing policy role under the Act. Knowledge that EPA may blue-pencil a revised policy choice in unrestricted and unpredictable ways, and federally enforce a regulation less acceptable to the state than the choice sought to be revised, will render all states considerably more reluctant to exercise the continuing responsibility and discretion Congress conferred. And where, as here, EPA elects to exercise that claimed authority, it implements and enforces *its* policy choice as to an appropriate mix of emissions for the state, ousting the state from the primary policy role Congress intended it to have.[11]

To countenance that claim of authority, as the decision of the Court of Appeals does, inevitably countenances precisely those administrative results which occurred in this case. EPA "approves" those portions of the revised regulation it likes, and which substantially expand the scope of the regulation, while it simultaneously disapproves and deletes concomi-

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[11] Sanctioning EPA's claim of authority, as exercised in this case, will result both in anamolies never intended by Congress and in the states' reluctance to submit revisions. For example, if a regulation submitted by a state provides that the restrictions it contains apply only to certain industries, EPA could, by employing the blue-pencil authority challenged here, delete that portion and thereby enact a regulation applicable to all industries. Similarly, the Agency could, by using its blue-pencil technique, have deleted the "0" in Indiana's 1974 APC–3 providing a 40% opacity limitation. Plainly Congress did not intend for the states to be subjected to this kind of unfettered authority on the part of EPA.

tant relaxations of restrictions viewed by the state as an integral part of its revised choice.[12]

This result fundamentally alters the Act and transfers to EPA powers heretofore both the Congress and this Court thought were reserved to the states. This Court should review the Court of Appeals decision in light of EPA's unwarranted usurpation of the states' role in determining the appropriate emissions mix, and the nationwide effects that flow from its judicial blessing.

III. EPA Has No Statutory Authority In Any Circumstance To Create And Enforce New Regulations Merely By "Partially Disapproving" Those Submitted By The State.

The further implications of the authority claimed and upheld below for the proper operation of the Act also justify review of the Court of Appeals' decision by this Court. Indiana has never adopted EPA's version of 1974 APC-3 and that version is quite clearly not operative as a matter of Indiana law.[13] Consequently, two different regulations are in effect in Indiana, one state and one federal, a result that Congress neither contemplated nor intended. Further, by proceeding as it has, EPA has deprived affected industries,

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[12] If EPA excises portions of a state submitted revision and "approves" the remainder, it is theoretically true that the state may subsequently seek EPA approval of the pre-existing regulation as a"revision" of EPA's version of the new regulation. But that places an extensive procedural burden on the state that is both unnecessary and unwarranted by the terms of the Act (a burden illustrated by Indiana's continuing and thus far unsuccessful efforts to revise EPA's version of 1974 APC–3; *supra* at p.5 and n.4). And even if eventually successful, in the interim the Agency is substituting and enforcing its policy choice rather than the state's, and is doing so in blatant evasion of the Act's procedural safeguards discussed in Section III, *infra*.

[13] Under Indiana law a regulation not subjected to public notice, hearing, adoption by the Air Pollution Control Board, and, inter alia, signature of Governor and publication in Indiana Register is "void" and of no effect. IND. CODE §§ 4-22-2-2, 4-22-2-5 (1982).

including petitioner, the opportunity for judicial review of the merits of its version of the regulation. Since EPA is enforcing what it says is a *state* regulation, there is no general opportunity for federal judicial review with respect to the economic and technical feasibility of EPA's version of 1974 APC-3. *Union Electric*, 427 U.S. 246 (1976). Yet, because the State has never adopted EPA's version as a state regulation, a state court likely would not have jurisdiction to engage in such a review. Finally, EPA is enforcing a regulation that was never the subject of the administrative procedures expressly mandated by the Act.[14]

The Court of Appeals seemed to recognize the reality and gravity of these problems, but refused to consider them because, in its view, they involved challenges only to a specific exercise of a general authority of partial approval and therefore were, in this case, time-barred under Section 307(b) of the Act, 42 U.S.C. § 1857h-5(b) (1976). 682 F.2d at 634 n.12, 636-38 & n.16 (A–18, 22-26). However, the existence of these problems is clearly relevant to the general question whether the Administrator has any authority at all to proceed in this fashion. Moreover, the appellate court's interpretation of Section 307(b) is flawed for the identical reasons that its conclusion with respect to EPA's general authority is wrong.

In large part, the Court of Appeals affirmed EPA's claim of general authority to proceed in this fashion because: (1) approval of state-submitted revisions should be governed by the standards applicable to approvals of original SIPs, 682 F.2d at 632 (A14-15); and (2) the plain language of the Act

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[14] It is worthy of mention that because of exercise of the authority claimed, the verbatim text of what EPA contends is Indiana 1974 APC–3 is nowhere set forth in publications of either Indiana or federal regulations. This results in an independent violation of 42 U.S.C. § 7410(h), see 44 Fed. Reg. 4948-49(1979), and is hardly a desirable result since violations are subject to draconian civil, and criminal, penalties. 42 U.S.C. § 7413(b) and (c) (Supp. IV 1980).

allows EPA to approve "any portion of the original SIP". *Id.* at 633 (A-16). But the equally plain language of the Act shows the Administrator has no authority whatever to proceed as was done here.

With the sole exception of the situation described in Section II, *supra*, where the state voluntarily elects to submit for approval a revision to an existing and adequate SIP, the plain language of the statute *requires* the Administrator to begin proceedings to promulgate *federal* regulations pursuant to Section 110(c)(1) *whenever* he disapproves a state submission in whole or in part.[15] Thus, with that one exception, there is no situation when Administrator *disapproves* in which he is not under a simultaneous duty to proceed under Section 110(c)(1). This duty is flatly inconsistent with the authority claimed here to arrive at an adequate SIP and finalize the administrative process *solely* by exercise of the disapproval power—*i.e.*, by deleting portions of the state's submission.

This conclusion is compelled by the procedural scheme of the Act as well as by its express language. There are doubtless innumerable situations where the Administrator may properly approve a portion of a state's submission and disapprove the remainder. EPA may, for example, generally approve restrictions yet disapprove their application to particular metropolitan areas of a state; it may approve one

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[15] Section 110(c)(1) of the Act provides, *inter alia:*

"The Administrator *shall* . . . promptly prepare and publish proposed regulations setting forth an implementation plan, or portion thereof, for a State if—. . .

(B) the plan, or any portion thereof, submitted for such State is determined by the Administrator not to be in accordance with the requirements of this section, or

(C) the State fails, within 60 days after notification by the Administrator or such longer period as he may prescribe, to revise an implementation plan as required pursuant to a provision of its plan referred to in subsection (a)(2)(H) of this section.

(Footnote continued on next page)

submitted emission limitation and disapprove another; it may approve such a limitation but disapprove its application to a particular industry. But the distinguishing feature of each of these "partial approvals" is that the administrative process is not finished because the state plan is, to the extent disapproved, inadequate to achieve national air quality standards. Hence, in each case, the Administrator has a mandatory duty pursuant to Section 110(c)(1) to propose federal regulations.

That there can never be a disapproval without a concomitant duty to proceed under Section 110(c)(1) is dictated both by the nature of the Administrator's authority to disapprove and by the role given the states by the Act.[16] EPA may disapprove a state submission only if, or to the extent that, it is inadequate to achieve national standards or otherwise fails to comply with Section 110(a)(2) of the Act. 42 U.S.C. § 7410(a)(2) (Supp. IV 1980). It has no authority to disapprove for any other reason. *Train*, 421 U.S. at 79. Thus, except where a pre-existing SIP has been approved and not subsequently found inadequate, *every* instance where EPA disapproves a state submission will be an instance where the state's SIP is inadequate. This

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> . . . . The Administrator *shall*, within six months after the date required for submission of such plan (or revision thereof), promulgate any such regulations unless, prior to such promulgation, such State has adopted and submitted a plan (or revision) which the Administrator determines to be in accordance with the requirements of this section . . ."

42 U.S.C. § 7410(c)(1) (Supp. IV 1980) (emphasis added). Thus, except where there has been proposed a voluntary revision of a valid pre-existing SIP, there is no situation where Section 110(c)(1) does not mandate further procedures by the Administrator in the event he disapproves, in whole or in part, a state submission.

[16] The logic of the single exception is plainly dictated by the same considerations. When the state voluntarily elects to revise an adequate state plan, but the revision is disapproved, an adequate SIP remains in effect. It is quite understandable, then, why Congress excepted this one exercise of the disapproval power in imposing the otherwise general duty to proceed pursuant to Section 110(c)(1) whenever a state submission is disapproved.

explains Section 110(c)(1)'s requirement that the administrative process proceed. The Administrator *must* proceed to remedy the inadequacy by means of federal regulations. 42 U.S.C. § 7410(c)(1) (Supp. IV 1980).[17]

The Court of Appeals stated that to require EPA to proceed pursuant to Section 110(c)(1), if it wished to enforce its version of 1974 APC-3 would be "unnecessarily duplicitous." 682 F.2d at 634 (A -18). That conclusion contains multiple errors. *First*, EPA has no authority to proceed under Section 110(c)(1) where, as here, it disapproves a revision of an existing adequate SIP (*see* Section II, *supra*). *Second*, even where Section 110(c)(1) is properly invoked, that section of the Act gives the state a second opportunity to develop a plan before EPA is authorized to impose the version it wishes, an opportunity denied under the administrative procedure used here. 42 U.S.C. § 7410(c)(1) (Supp. IV 1980).

Third, the two methods expressly provided by the Act for enacting enforceable emissions limitations, state submission and EPA approval on the one hand, and EPA promulgation pursuant to Section 110(c)(1) on the other, both require *public hearings* in the affected state on the proposed regulations. 42 U.S.C. §§ 7410(a)(2), 7410(a)(3), 7410(c)(1) (Supp. IV 1980). Aside from the fact that the statute requires such hearings, there is no basis for viewing them as "duplicitous." In addition to the information gathering function obviously served, the Act's requirement that EPA hold public hearings on proposed federal regulations *in the affected state*, 42 U.S.C. § 7410(c)(1) (Supp. IV 1980), indicates Congress' awareness that substantive changes in EPA's proposed regulations may result from the political dynamics of face to face confrontations with state and local public officials, affected local industries, and local environmental interests. The exercise of the authority claimed by the Administrator,

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[17] Further, proceeding under Section 110(c)(1) gives the state a second opportunity to correct the problem by means of its own choosing, 42 U.S.C. § 7410(c)(1) (Supp. IV 1980), an opportunity wholly abrogated by the authority claimed here to finalize the process merely by deleting portions of the state's submission.

and sanctioned by the Seventh Circuit, patently permits evasion of this statutory requirement.

Fourth, even if EPA follows notice and comment procedures for rulemaking in making its decision to approve or disapprove a state submission,[18] *that* decision process is in no way an adequate substitute for the rulemaking process required when EPA proposes to promulgate federal regulations pursuant to Section 110(c)(1).[19] In the approval/disapproval decision, EPA's authority and responsibility is limited to determining whether the state's submission meets the requirements of the Act. *Train*, 421 U.S. at 79. Its authority and responsibility in promulgating federal regulations pursuant to Section 110(c)(1) is much broader since it must then also make decisions with respect to the appropriate mix of limitations.[20] And because the essential focus and character

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[18] It did not in this case. No notice of any intent to disapprove 1974 APC-3's 15 minute exception while "approving" the remainder was published prior to EPA's order. *Supra* at p. 5. Following the decision in *Buckeye Power, Inc.* v. *EPA*, 481 F.2d 162 (6th Cir. 1973), EPA indicated that it would follow general Administrative Procedure Act ("APA") requirements for informal rulemaking prior to taking "approval/disapproval actions on SIP actions submitted by states ...." *Revisions to State Implementation Plans—Procedures for Approval-Disapproval Actions*, OAQPS No. 1.2-005A, EPA, October, 1975 at 8.

[19] Prior to the 1977 amendments to the Act, EPA was required to follow APA Section 553 rulemaking procedures, 5 U.S.C. § 553 (1976), when it promulgated federal regulations to replace or supplement a deficient SIP. *See, e.g., Maryland* v. *EPA*, 530 F.2d 215 (4th Cir. 1975), *vacated on other grounds sub nom. EPA* v. *Brown*, 431 U.S. 99 (1977). Under the Act as now amended, the Agency must employ rulemaking procedures far more elaborate than those required for rulemaking under the APA, *see* Section 307(d), 42 U.S.C. § 7607(d)(Supp. IV 1980), all of which may be evaded by exercise of the authority claimed here and upheld below.

[20] This Court has left open the question whether EPA must consider economic and technical feasibility issues when it promulgates federal regulations pursuant to Section 110(c)(1). *Union Electric*, 427 U.S. at 261 n.7. Several lower federal courts have

(Footnote continued on next page)

of the decision making process is altered, requiring further rulemaking proceedings under Section 110(c)(1) is far from "duplicitous" as held by the appellate court—Congress deemed it essential to the end of careful and reasoned decision making. 42 U.S.C. §§ 7410(c)(1), 7607(d) (Supp. IV 1980).

Finally, the Court of Appeals erred in part in its analysis of EPA's contention that review of the issues in this case is time barred by Section 307(b)(1) of the Act, 42 U.S.C. § 1857h-5(b)(1) (1976). It correctly held that Section § 307(b)(1)'s requirement for expeditious review of EPA action in approving submissions does not preclude a challenge questioning EPA's general "power to partially approve a revision . . . ." 682 F.2d at 636, n.17 (A-23). That issue on the merits is identical to the issue of Section 307(b)(1)'s application. Section 307(b)(1) governs judicial review of EPA approvals. Therefore, the question of the Administrator's general authority is the same as the question whether what he did here is an "approval" within the meaning of Section 307(b). 42 U.S.C. § 1857h-5(b) (1976).[21] However, once the Court of Appeals determined that EPA had general statutory authority partially to approve revisions, it viewed many of

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indicated that it must. *Bunker Hill Co.* v. *EPA*, 572 F.2d 1286, 1294 (9th Cir., 1977); *Kennecott Copper Co. v. Train*, 526 F.2d 1149 (9th Cir. 1975) *cert. den.* 425 U.S. 935 (1976); *South Terminal Corp. v. EPA*, 504 F.2d 646 (1st Cir. 1974). However this Court ultimately resolves that issue, it is obvious that in a Section 110(c)(1) proceeding EPA must to some extent step into the shoes of the defaulting state, and must consider and resolve many issues irrelevant to its prior decision to disapprove the state's submission.

[21] Although not cited by the Court of Appeals, its conclusion in this respect is squarely supported by this Court's decision in *Adamo Wrecking Co. v. United States*, 434 U.S. 275 (1978), holding Section 307(b)(2), 42 U.S.C. § 1857h-5(b) (1976), did not bar the Court from deciding the question whether "the regulation which the defendant is alleged to have violated is on its face an 'emission standard' within the broad limits of the congressional meaning of

(Footnote continued on next page)

PSI's arguments as challenging only the propriety of the exercise of that authority in the circumstances, consideration of which was time barred by Section 307(b)(1).

Section 307(b)(1) as in effect in 1975 permitted review only of EPA action "in approving" state submissions. 42 U.S.C. § 1857h-5(b)(1)(1976). Courts interpreting that provision at the time held that EPA action approving in part and disapproving in part a state submission was not final and hence not reviewable at that point. *Utah International, Inc.* v. *EPA*, 478 F.2d 126 (10th Cir. 1973); *Anaconda Company* v. *Ruckelshaus*, 482 F.2d 1301, 1304-5 (10th Cir. 1973). *See also, Natural Resources Defense Council, Inc.* v. *EPA*, 481 F.2d 116,121 (10th Cir., 1973). The Seventh Circuit purported to distinguish *Utah International's* finality holding on the grounds that there, but not here, the Administrator had proposed to promulgate federal regulations pursuant to Section 110(c)(1), and hence the administrative process was not completed.[22] In so distinguishing *Utah International*, the Court of Appeals simply repeated its error with respect to the question on the merits. Under the Clean Air Act properly construed, except where there is an adequate pre-existing SIP, EPA disapproval of a state submission is *never* the end of the administrative process because Section 110(c)(1) always mandates further administrative action.

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that term." *Id.* at 285. *See also, id.* at 294 n.1 (Stevens, J., dissenting): Section 307(b) "applies only if the Administrator's action could have been reviewed in the Court of Appeals for the District of Columbia Circuit; and review was not available there unless the Administrator's 'action' was the promulgation of an 'emission standard' within the meaning of 307(b)."

[22] The Court relied upon *Big Rivers Electric Corp.* v. *EPA*, 523 F.2d16, 18 (6th Cir., 1975). However, as noted *supra* at p.7 n.8, and by the Court of Appeals, 682 F.2d at 634 n.11, EPA's authority to finalize the administrative process by disapproving portions of the state's submission was not challenged in that case and was not addressed by that court.

Whether evaluated in terms of its express language, the logic of the procedural scheme it establishes, or the central policies it reflects, the Act contemplates *no* situation where EPA can establish by disapproval standing alone either an adequate SIP or, necessarily, the finality required to invoke timely review under the 1975 version of Section 307(b)(1), 42 U.S.C. § 1857h-5(b)(1) (1976).[23]

CONCLUSION

For the foregoing reasons, a Writ of Certiorari to the Court of Appeals for the Seventh Circuit should be granted, and the judgment of that Court entered June 25, 1982, should be reversed.

Dated: September 23, 1982.

Respectfully submitted,

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[23] In 1977, Congress revised Section 307(b)(1), *inter alia*, to provide for judicial review of EPA actions *disapproving* state-submissions as well. Section 307(b)(1), 42 U.S.C. § 7607(b)(1) (Supp.IV 1980). That amendment affects only the question of when the administrative process is sufficiently final for purposes of judicial review, and in no manner alters the EPA's general authority and duties with respect to the issues presented by this Petition.

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FILED
SEP 23 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-512

In the Supreme Court of the United States

OCTOBER TERM, 1982

PUBLIC SERVICE COMPANY OF INDIANA, INC.,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and ANNE M. GORSUCH,
Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PUBLIC SERVICE COMPANY OF INDIANA, INC.,
Plaintiff-Appellant,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and DOUGLAS M. COSTLE,
Defendants-Appellees.

No. 81-1241.

United States Court of Appeals,
Seventh Circuit.

Argued Oct. 28, 1981.

Decided June 25, 1982.

Electric utility sought declaratory and injunctive relief, as well as return of various documents, in connection with two allegedly unconstitutional and extrastatutory administrative inspections of two of its facilities by representatives of the Environmental Protection Agency. The United States District Court for the Southern District of Indiana, James E. Noland, J., 509 F. Supp. 720, granted summary judgment for Environmental Protection Agency, and electric utility appealed. The Court of Appeals, William J. Campbell, Senior District Judge, sitting by designation, held that inspection warrants based upon sworn allegations of possible violations of the Clean Air Act at two of company's facilities were not overly broad; since Indiana's 1974 regulation concerning capacity of limitations was federally enforceable with the 15-minute exemption excised, applications for inspection warrants, which alleged emissions in excess of particular emissions limitation and capacity limitation, presented sufficient probable cause to justify their issuance to the Environmental Protection Agency.

Affirmed.

1. Health and Environment Key No. 25.5(9)

Even assuming that there was a resolution of issue of whether the Environmental Protection Agency partially approved a 1974 APC-3 in prior case, where that finding

would have been unnecessary to judgment in the case, Agency was not collaterally estopped from asserting in present case that 1974 APC–3 was partially approved.

2. Health and Environment Key No. 25.6(8)

The Environmental Protection Agency has power to partially approve state's revision of its state implementation plan. Clean Air Act, § 110(a)(3)(A), 42 U.S.C.A. § 7410(a)(3)(A).

3. Health and Environment Key No. 25.15(1)

Failure of appellant to file timely petition in proper forum seeking review of Environmental Protection Agency's partial approval of revised regulation in a state implementation plan deprived appellate court of jurisdiction over those issues. Clean Air Act, § 110(a)(3)(A), 42 U.S.C.A. § 7410(a)(3)(A).

4. Health and Environment Key No. 25.15(6)

Appellant was not denied opportunity for judicial review of action of Environmental Protection Agency partially approving state implementation plan where agency order was clearly a final administrative action and operated to put in effect certain new and revised regulations of Indiana State Implementation Plan. Clean Air Act, § 307(b)(1), 42 U.S.C.A. § 7607(b)(1).

5. Health and Environment Key No. 25.6(9)

Inspection warrants based upon sworn allegations of possible violations of the Clean Air Act at two of company's facilities were not overly broad; since Indiana's 1974 regulation concerning capacity of limitations was federally enforceable with the 15-minute exemption excised, applications for inspection warrants, which alleged emissions in excess of particular emissions limitation and capacity limitation, presented sufficient probable cause to justify their issuance to the Environmental Protection Agency. Clean Air Act, § 101 et seq., 42 U.S.C.A. § 7401 et seq.

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Patrick J. Cafferty, Dept. of Justice, Washington, D.C., for defendants-appellees.

Before BAUER and WOOD, Circuit Judges, and CAMPBELL, Senior District Judge*.

WILLIAM J. CAMPBELL, Senior District Judge.

Appellant, Public Service Company of Indiana (hereafter PSI) brought this action in District Court contesting the appellees, the Environmental Protection Agency and its Administrator Douglas M. Costle (hereafter "the EPA," "the agency," or "the Administrator"), acquisition and utilization of certain inspection warrants. The warrants were issued by a United States Magistrate based upon sworn allegations of possible violations of the Clean Air Act, 42 U.S.C. § 7401 *et seq.*, at two of PSI's facilities. The appellant contends that the warrants were issued without probable cause and that the inspections authorized thereby were excessively broad. After a hearing, the District Court granted summary judgment for the defendants. PSI then filed this appeal.

On March 6, 1979, an authorized inspector for the EPA requested permission to inspect PSI's facility in Gibson County, Indiana (hereafter "the Gibson Station"). The inspector was denied admittance because he refused to sign a "Visitor's Admission Agreement" which contained a waiver of liability provision. On May 17, 1979, two EPA employees were again denied admission to a PSI facility, the Wabash River Generating Station (hereafter the "Wabash River Station") because they declined to sign a similar "Visitor's Admission Agreement."

Subsequently, the EPA applied to United States Magistrate J. Patrick Endsley for the issuance of warrants authorizing the inspection of those facilities. The application for the Wabash River Station was supported, *inter alia*, by the affidavit of David Schulz, an EPA inspector, in which he stated that stack tests and other monitoring data indicated

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*Honorable William J. Campbell, Senior District Judge of the Northern District of Illinois, is sitting by designation.

possible violations of the Indiana State Implementation Plan, i.e. emissions in excess of the particulate emissions limitation. (Regulation APC–4R) and the opacity limitation (Regulation APC–3). In support of the warrant for the Gibson Station, the EPA also submitted an affidavit of David Schulz which stated that certain monitoring data indicated possible violations of Regulation APC–3. Magistrate Endsley issued the two warrants on January 7, 1980 and they were executed on the following two days.

After the inspections, PSI moved to quash the warrants but those motions were denied by Magistrate Endsley on April 1, 1980. This action was then filed in District Court seeking declaratory and injunctive relief. PSI sought a declaratory judgment determining that:

> (1) Indiana's Regulation APC–3 is not enforceable; (2) there was no probable cause for issuance of the warrants (because APC–3 is not federally enforceable); (3) the warrants authorized overly broad inspections; and (4) the warrants did not authorize the seizure or demand of documents stored at locations other than those specifically authorized for inspection.[1] PSI also requested injunctive relief preventing future inspections and enforcement actions resulting from information obtained pursuant to those warrants. As noted previously, the District Judge denied all the relief requested.

LEGAL BACKGROUND

Prior to addressing the issues on appeal, a summary of the legal background of this case is necessary.

The Clean Air Act, 42 U.S.C. § 7401, *et seq.* (hereafter "The Act") authorizes the EPA to promulgate national primary and secondary ambient air quality standards designed to protect the public health and welfare, 42 U.S.C. § 7409(a)(1). However, the primary responsibility for the promulgation of regulations to implement, maintain and enforce these standards is given to the states, 42 U.S.C. § 7401(a)(3). The Act

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[1] The latter issue has not been raised on appeal.

directs each state to submit to the EPA a State Implementation Plan (hereafter "SIP"), 42 U.S.C. § 7410(a)(1), which the Administrator must approve if the plan satisfies the criteria specified in 42 U.S.C. § 7410(a)(2)(A)–(K), 42 U.S.C. § 7410(a)(2). The agency is authorized to promulgate additional or substitute provisions for a state's SIP if a satisfactory plan is not submitted, 42 U.S.C. § 7410(c)(1). The Act contemplates that the states will periodically revise their SIPs, see, *inter alia*, 42 U.S.C. § 7410(a)(2)(H), and any such revisions must be submitted to the Administrator for approval based on the criteria of 42 U.S.C. § 7410(a)(2)(A)–(K), 42 U.S.C. § 7410(a)(3)(A).

The specific standards used to determine whether a SIP or its revisions conform to the requirements of 42 U.S.C. § 7410 (a)(2)(A)–(K) are contained in the agency's regulations, see 40 C.F.R. Part 51. The Administrator's approval actions on each state's SIP and its revisions are published in the Federal Register and are contemporaneously codified and incorporated into the agency's regulations, see 40 C.F.R. Part 52.

Pursuant to the statutory scheme, Indiana submitted its SIP to the EPA for approval in January of 1972. The Plan included, *inter alia*, a provision limiting the emission of particulate matter, labelled APC–4,[2] and a provision relating to opacity limitations, labelled APC–3. These regulations were approved by the EPA (with some minor modifications to APC–4 not relevant here) and thus became part of the federally enforceable SIP. In 1974, Indiana submitted to the EPA new and revised regulations, including a revision of APC–3.[3] Like its predecessor, the new version of APC–3 (hereafter the "1974 APC–3") mandated a maximum opacity limitation of 40% (Ringelmann No. 2). However, it included a new provision which permitted a fifteen minute exemption from that requirement for each 24-hour period.

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[2] APC–4 was subsequently redesignated by the state as APC–4R.

[3] The entire revised APC–3 is reproduced in Appendix A.

The EPA published a notice summarizing the proposed regulations and soliciting comments, 40 Fed. Reg. 19210–19211 (May 2, 1975). Subsequently, the EPA published an order (hereafter the "October 1975 order") consisting of "final agency action" on six of the regulations, including the 1974 APC–3, 40 Fed. Reg. 50032–50033 (October 28, 1975).[4] While it is undisputed that the Administrator disapproved the 15 minute exemption, the approval status of the remainder of the regulation is the subject of controversy.

The EPA contends that it approved the 1974 APC–3 with the exception of the 15 minute limitation and that therefore the regulation is federally enforceable to that extent.[5] PSI contends that the 1975 order disapproved the 1974 APC–3 in its entirety. Appellant presents three arguments in support of its position: (1) that this court determined in *Bethlehem Steel Corp.* v. *EPA*, 638 F.2d 994 (7th Cir. 1980) that the EPA had not partially approved the 1974 APC–3 and therefore the agency is collaterally estopped from relitigating that issue; (2) that the EPA lacks the power to partially approve revisions to a state's SIP and thus the EPA's order cannot be so construed; and (3) that the language of the 1975 order can only be interpreted to effectuate a complete disapproval of that regulation. We shall address these issues *seriatim*.

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[4] This order is reproduced in Appendix B.

[5] The EPA also contends that we need not reach the issue of the federal enforceability of the 1974 APC–3. The agency notes that the application for the Wabash River Station alleged violations of APC–4R which is indisputably federally enforceable, see ft. 3 *supra*. As to the Gibson Station, the EPA argues that since, under the Indiana SIP, violations of APC–3 constitute *prima facie* evidence of violations of APC–4R, see APC–3(3), the application for the warrant alleged sufficient probable cause of a violation of APC–4R (although that regulation was never mentioned therein). However, PSI sought a declaratory judgment determining that APC–3 is not federally enforceable, see pp. 628–629 *supra*, and therefore we cannot avoid that issue.

COLLATERAL ESTOPPEL.

[1] PSI contends that the EPA is collaterally estopped from asserting that it partially approved the 1974 APC–3 because this Court held to the contrary on that identical issue in *Bethlehem Steel, supra.* It is, of course, settled law that for collateral estoppel to apply the issue must have been actually litigated in the prior suit, the court must have resolved the issue, and that resolution must have been necessary to the judgment, *Continental Can Co.* v. *Marshall*, 603 F.2d 590 (7th Cir. 1979) (and cases cited therein).

In *Bethlehem Steel,* this Court reviewed an EPA order which had disapproved the issuance of a Delayed Compliance Order (DCO)[6] to Bethlehem Steel by the Indiana Air Pollution Control Board. Bethlehem Steel had initiated the action pursuant to 42 U.S.C. § 7413(d)(2) contesting the EPA's action. In a thorough opinion, this Court rejected the six reasons relied on by the agency for disapproving the DCO and vacated the order.

One of the alleged deficiencies noted by the EPA in disapproving the DCO was that the state had relied on a regulation that the EPA had partially disapproved. That is, the DCO cited Regulation APC–3 and the EPA concluded that this referred to the 1974 APC–3 which incorporated the disapproved 15 minute exemption. The EPA reasoned that it could not approve the DCO because it was not authorized by 42 U.S.C. § 7413(d)(1) to approve compliance with a requirement less stringent than the applicable SIP.

Bethlehem Steel argued that the EPA lacked the power to partially approve a state's SIP revisions and therefore the agency's action of the 1974 APC–3 must be treated as a complete disapproval of it. Consequently, Bethlehem Steel contended, the original APC–3 was a part of the applicable

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[6] A delayed compliance order is essentially an extension of time granted to a specific stationary pollution source to permit it to comply with certain national ambient air quality standards, see 42 U.S.C. § 7413(d)(1).

SIP and was the only enforceable version of that regulation. Under this reasoning, the EPA's approval of the DCO was not prohibited by 42 U.S.C. § 7413(d)(1).

The Court did not accept either party's position, stating:

> "... even if we were to agree that the Administrator indeed has the authority to approve revisions partially, the record utterly fails to support that he in fact did so in this case. Furthermore, even if it had been established that he did so, the record fails to establish that the state did in fact apply the wrong APC–3 in the DCO. 638 F.2d at 1007.

While the DCO in issue did not specify which APC–3 the state applied, the Court determined that the circumstances strongly indicated that it was the 1974 version. However, the Court found no evidence that the 15 minute exemption was relied on by the state in reaching its decision. Additionally, it noted that the EPA's conclusion as to which APC–3 had been applied was inconsistent with a previous order of the agency which approved a different Indiana DCO that relied on APC–3, see 44 Fed. Reg. 15493–94 (March 14, 1979). The Court concluded its discussion of the issue in the following paragraph:

> In short, the record is inadequate to allow this court effectively to review the Administrator's action. Without any input from the state Board, we are totally uninformed as to which APC–3 the state intended to apply to Bethlehem, or whether the APC–3 applied incorporated the 15-minute exemption. It would seem the state intended to apply the APC–3 the Administrator wishes enforced, yet he had baldly concluded otherwise. Without some support in the record, we cannot accept this as an adequate basis for the Administrator's decision. 638 F.2d at 1008.

Analyzing *Bethlehem Steel* in light of the requirements of *Continental Can*, it is evident that collateral estoppel does not apply to this case. The court's rejection of the EPA's position was based on the inadequacy of the record in supporting the agency's contention that the wrong APC–3 was applied by the state in the DCO. Additionally, the fact that the EPA had recently approved a different Indiana DCO

which similarly relied on APC–3 suggested arbitrary action by the agency. It does not appear from the language of the opinion that the Court intended to conclusively resolve the question of the approval status of the 1974 APC–3.

However, even assuming that the court in *Bethlehem Steel* determined that the agency had disapproved the entire 1974 APC–3 that finding would have been unnecessary to the judgment in the case. The EPA's position was based on two contested factual premises: (1) that Indiana had applied the 1974 APC–3 with the 15 minute exemption in the DCO; and (2) that the 1974 APC–3 had been partially approved (with the 15 minute exemption being disapproved) and therefore was part of the Indiana SIP. Once the Court determined that the first premise was not supported by the record the agency's position could not be accepted. Since the Court had already rejected the agency's five other reasons for disapproving the DCO, the elimination of this final rationale provided the basis for vacating the EPA's order. Thus, the Court's resolution of the second factual premise, i.e. the approval status of the 1974 APC–3, would not have affected the relief granted and therefore would not have been necessary to the judgment in the case.[7] Accordingly, even

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[7] We note that neither party addressed the necessity requirement of collateral estoppel in the context of this case. However, subsequent to oral argument, appellant submitted as "additional authority" a copy of the petition filed in *Bethlehem Steel*. In the accompanying letter, counsel for the appellant stated:

> "At oral argument Judge Campbell appeared unaware that the case of *Bethlehem Steel Corp.* v. *E.P.A.* [citation omitted] arose pursuant to Bethlehem's specific petition for review of any order of appellee EPA's promulgating a more stringent opacity limitation than Indiana Regulation APC–3."

This submission was unnecessary since the Court had taken judicial notice of the record in that case pursuant to the parties' request (PSI brief p. 21 ft. 12, EPA brief p. 34 ft. 22). Thus, the Court was aware of the contents of the petition in *Bethlehem Steel*. The Court admits, however, that it is unaware of the relevance of

(Footnote continued on next page)

assuming that there was a resolution of the issue in *Bethlehem Steel*, we conclude that the EPA is not collaterally

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appellant's submission. The accompanying letter provides no explanation; but we presume appellant is attempting to show that the EPA's partial approval of the 1974 APC–3 was directly put in issue in *Bethlehem Steel* and therefore was necessarily decided. However, this contention is without merit. Paragraph 1 of the petition in *Bethlehem Steel* requested the Court to review the EPA's order disapproving the state's DCO. Paragraph 2 stated:

> "The Order referred to in paragraph 1 of this Petition disapproves a State-issued delayed compliance order and states as one basis for disapproval the following:
>
> '(6) In addition, visible emissions Regulation APC–3 cited in the State Order is not the APC–3 which constitutes a part of the applicable State Implementation Plan (SIP).'
>
> Petitioner accordingly petitions this Court to review, in addition to the Order referred to in paragraph 1 hereof any order of the Administrator promulgating for the Indiana State Implementation Plan a visible emission regulation different from APC–3 referred to in the State Order and disapproved by the Administrator at 40 C.F.R. § 52.776(c) and § 52.792(a) (40 Fed.Reg. 50033, Oct. 28, 1975). Petitioner is unable to make any more definitive designation of such an order because it has been unable to discover any record of such action or any publication containing the text *of the federally promulgated replacement regulation referred to in the quotation above.*" (emphasis supplied)

It is difficult to see how the above request could have put in issue the partial approval of the 1974 APC–3 since by its own language it assumes that the 1974 APC–3 was disapproved in its entirety. Additionally, it is undisputed that the EPA did not promulgate any additional visible limitations regulations for the Indiana Plan. In fact, appellant argues that the omission rendered ineffective the EPA's partial approval, see pp. 633–634 *infra*. Thus what was sought to be reviewed by the above request did not in fact exist. The Court in *Bethlehem Steel* was apparently aware of this fact since the opening paragraph of the opinion clearly states that the only matter under review was the EPA's disapproval of the state's DCO. Therefore, this "additional authority" has no bearing on the issues in this case.

estopped from asserting herein that the 1974 APC–3 was partially approved.[8]

THE EPA'S AUTHORITY TO APPROVE REVISIONS

[2] Prior to determining whether, in fact, the EPA partially approved the 1974 APC–3, it must be determined whether the agency has the power to partially approve a state's revision of its SIP. The agency's authority is addressed in 42 U.S.C. § 7410(a)(3)(A) which provides:

> The Administrator shall approve any revision of an implementation plan applicable to an air quality control region if he determines that it meets the requirements of paragraph (2) [42 U.S.C. § 7410(a)(2)] and has been adopted by the State after reasonable notice and public hearings.

Appellant argues that the Administrator is not empowered to partially approve a regulation because that would permit him to approve something never actually adopted by the state and would permit him to circumvent the promulgation procedures required by 42 U.S.C. § 7410(c). The EPA contends that its power to approve revisions to a SIP is equivalent to its power to approve the original SIP. Since under 42 U.S.C. § 7410(a)(2) the agency has the authority to approve a plan "or any portion thereof," the EPA's position is that it may approve any portion of a state submitted revision, see 40 C.F.R. § 51.8.

Initially, we note that considerable deference is to be accorded an administrative agency's construction of an Act it is charged with enforcing, *Udall* v. *Tallman*, 380 U.S. 1, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965). This principle has been recently applied to the EPA's interpretation of the Clean Air Act, *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60, 95 S.Ct. 1470, 43 L.Ed.2d 731 (1975); *Union Electric Co.* v. *E. P. A.*, 427 U.S. 246, 96 S.Ct. 2518, 49 L.Ed.2d 474 (1976).

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[8] We note that in a recent case, *United States* v. *Bethlehem Steel Corporation*, Civil No. H–78–491 (N.D.Ind., February 12, 1982), the Court concluded that *Bethlehem Steel* did not conclusively establish the unenforceability of APC–3 and chose instead to rely on the lower court decision in the instant case.

The major issue in *Train* was whether a state variance applicable to an individual pollution source could be approved by the EPA as a "revision" under 42 U.S.C. § 7410(a)(3) or only as a "postponement" under 42 U.S.C. § 7410(f). The EPA had argued that § 7410(a)(3) was appropriate, but the Fifth Circuit had concluded that § 7410(f) was the only permissible means for approving such a variance. That decision limited the agency's power significantly since the requirements of 42 U.S.C. § 7410(f) were more stringent, both procedurally and substantively, than those of 42 U.S.C. § 7410(a)(3). The Supreme Court reversed the Fifth Circuit's decision, stating:

> "Without going so far as to hold that the Agency's construction of the Act was the only one it permissibly could have adopted, we conclude that it was at the very least sufficiently reasonable it should have been accepted by the reviewing courts." 421 U.S. at 75, 95 S.Ct. at 1479-80.

Similarly, we find that the agency's interpretation in this case is sufficiently reasonable that we should accept it. The function of the Administrator's approval power over the original SIPs and their revisions is identical: to ensure that the state's SIPs comply with the minimum requirements of 42 U.S.C. § 7410(a)(2)(A)–(K). The subsections governing the exercise of these powers are essentially identical, the only major distinction being that 42 U.S.C. § 7410(a)(2) permits approval of the SIP "or any portion thereof" while 42 U.S.C. § 7410(a)(3) permits approvals of "revisions." The meaning of the term "revision" in this subsection was addressed in *Train*. The Court did not provide a specific definition but stated that

> "In the implementation plan context, normal usage would suggest that . . . a revision is a change in the plan itself which deletes or modifies [a] requirement." 421 U.S. at 89, 95 S.Ct. at 1486–87.

Applying that usage, 42 U.S.C. § 7410(a)(3) empowers the Administrator to approve any change in a SIP, i.e., any provision which differs, in substance or effect, from the original SIP. This interpretation is reasonable in light of the purpose of the approval process, i.e., to ensure that the

current SIP complies with the requirements of 42 U.S.C. § 7410(a)(2)(A)–(K).

To limit the Administrator to approving or disapproving each entire revised regulation in a SIP would elevate form over substance and would be inconsistent with the policy underlying the approval process. Congress intended each state to be given wide discretion in formulating its SIP, with the only limitation being that each plan must comply with the criteria listed in 42 U.S.C. § 7410(a)(2)(A)–(K), see *Train*, 421 U.S. 62, 79, 95 S.Ct. 1473, 1481; *Union Electric*, 427 U.S. 248, 250, 96 S.Ct. 2521, 2522; *Bethlehem Steel*, 638 F.2d 994, 996–997. To that end, Congress limited the agency's power to disapprove each state's submissions:

> "[§ 7410(a)(3)] requires the Agency to approve "any revision" which is consistent with [§ 7410(a)(2)'s] minimum standards for initial plan, and which the State adopted after reasonable public notice and hearing; no other restrictions whatsoever are placed on the Agency's duty to approve revisions." *Train*, 421 U.S. at 98, 95 S.Ct. at 1491.

To require the Administrator to disapprove an entire regulation because one provision in it is inconsistent with the requirements of 42 U.S.C. § 7410(a)(2) would unnecessarily curtail the discretion of the states in formulating their SIPs. Additionally, such a construction would require the agency to disapprove portions of a state's plan that comply with 42 U.S.C. § 7410(a)(2). Thus, we find the agency's construction of 42 U.S.C. § 7410(a)(3) to be reasonable in light of the language and purpose of that statute.

PSI's arguments to the contrary are unpersuasive. Appellant contends that to permit the Administrator to approve a portion of a revised regulation would allow him to approve something not actually adopted by the state as required by 42 U.S.C. § 7410(a)(3)(A), citing *Citizens For A Better Environment v. EPA*, 649 F.2d 522 (7th Cir. 1981); *Illinois v. Celotex Corporation*, 516 F.Supp. 716 (C.D.Ill.1981); *Sierra Club v. Indiana and Michigan Electric Comp.*, No. NA 81–8C (S.D.Ind. June 5, 1981); *Sierra Club v. Indiana-*

Kentucky Electric Corp., No. NA 81-7-C (S.D.Ind. May 11, 1981). However, approval of *any portion of the original SIP* is clearly permitted by 42 U.S.C. § 7410(a)(2) even though that subsection also limits the Administrator to approving that which was adopted by the state. Appellant has provided no reason why regulations should be severable for approval purposes when submitted as part of the original SIP but not when they are submitted as revisions to the SIP.[9] The cases cited by appellant are inapposite. Those cases simply hold that the EPA cannot approve state regulations which were improperly promulgated by the state and therefore invalid when submitted to the agency. We do not construe the adoption requirement to prevent the EPA from approving only those portions of revisions to a SIP that comply with the criteria of 42 U.S.C. § 7410(a)(2)(A)-(K).

PSI also argues that partial approval of a revision is not permissible because it would enable the Administrator to circumvent the promulgation procedures mandated by 42 U.S.C. § 7410(c). In support of this contention the appellant quotes *District of Columbia v. Train*, 521 F.2d 971 (D.C.Cir.1975), *vacated*, 431 U.S. 99, 97 S.Ct. 1635, 52 L.Ed.2d 166 (1977),

> "[§ 7410(c)] is in fact the [EPA's] only recourse when [it] disapproves a state submitted plan in whole or in part . . ." 521 F.2d at 983-984.

However, the rest of that sentence reads:

> "or if the state fails to submit a plan, *since the Act contains no enforcement mechanisms which could be used to force a reluctant state to adopt and submit an*

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[9] In the absence of a compelling argument to the contrary, we must presume that the adoption requirement has the same meaning in subsection (a)(3) as in subsection (a)(2), *Lewellyn* v. *Harbison*, 31 F.2d 740, 742 (3rd Cir. 1929); *United States* v. *Montgomery Ward*, 150 F.2d 369, 376-377 (7th Cir. 1945), vacated as moot, 326 U.S. 690, 66 S.Ct. 140, 90 L.Ed. 406 (1945); *Gregg* v. *Manno*, 667 F.2d 1116, 1117 (4th Cir. 1981).

adequate plan under section 110(a)." Id. emphasis supplied)

This language is particularly significant in view of the facts of that case. In *District of Columbia v. Train*, the EPA had disapproved certain portions of the transportation control plans submitted by Maryland, Virginia, and the District of Columbia. The agency then promulgated proposed regulations which included provisions ordering those states to submit additional regulations. The court vacated those portions of the agency's order, stating:

> "By ordering the states to enact and submit regulations after their initial plans were found to be inadequate, rather than promulgating his own regulations directly controlling sources of air pollution, the Administrator has thus exceeded the authority conferred upon him by section 110(c) of the Clean Air Act." 521 F.2d at 986.

Thus the holding in *District of Columbia v. Train* was that the agency is not authorized to require the states to submit an adequate SIP or additional provisions thereto.[10]

There is no indication that the holding in *District of Columbia v. Train* was intended to relate to a situation in which a particular provision in a SIP (or a revision to it) does not satisfy the requirements of 42 U.S.C. § 7410(c)(2)(A)-(K) and a satisfactory substitute cannot be promulgated or would be superfluous.[11] Apparently in this situation, the appellant

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[10] This is settled law, *Plan for Arcadia* v. *Anita Associates*, 379 F.Supp. 311, aff'd 501 F.2d 390 (9th Cir. 1974); *Brown* v. *EPA*, 521 F.2d 827 (9th Cir. 1975); *Friends of the Earth* v. *Carey*, 422 F.Supp. 638 (S.D.N.Y.1976), see also *Illinois* v. *E.P.A.*, 621 F.2d 259, 261 (7th Cir. 1980).

[11] This type of situation occurred in *Big Rivers Electric Corp.* v. *EPA*, 523 F.2d 16 (6th Cir. 1975), *cert. denied*, 425 U.S. 934, 96 S.Ct. 1663, 48 L.Ed.2d 175 (1976), and the Court upheld the

(Footnote continued on next page)

would have the agency either repromulgate (with appropriate hearings, etc. see 42 U.S.C. § 7410(c)) the state's submission with the disapproved portions excised, or draft and promulgate an entirely different but satisfactory regulation. The former alternative would be unnecessarily duplicitous and should not be mandated in the absence of specific legislation requiring it; the latter method would be similarly duplicitous and would be inconsistent with the congressional policy underlying the approval process, see pp. 632-633 *supra*.

In summary, we find that the agency's interpretation of 42 U.S.C. § 7410(a)(3) is quite reasonable and will be adopted by this court. Appellant's arguments to the contrary are unpersuasive.[12] It has demonstrated no compelling reason for construing the Administrator's power to approve revisions as different from his power to approve the original SIP. Since the latter power clearly includes the authority to approve any portion of the SIP, and such a construction does not do violence to the language of the statute relating to SIP revisions, we shall adopt the agency's construction.

Administrator's disapproval of the provision without requiring any promulgation pursuant to 42 U.S.C. 7410(c), see p. 637 *infra*. However, we note that there was no specific discussion in that opinion of the adoption requirement.

[12] Appellant presents a parade of administrative "horribles" that could occur if partial approval is permitted, e.g., such regulations could not be challenged in state courts on grounds of infeasibility nor could they be the subject of a state variance. This presentation ignores the fact that all of these alleged "horribles" can occur as a result of the Administrator's authority to partially approve the original SIP. More importantly, as noted in *Train*, this type of argument "goes more to the wisdom of what Congress has chosen to do than to determining what Congress has done," 421 U.S. at 92, 95 S.Ct. at 1488. Additionally, if the specific exercise of the partial approval power results in a deprivation of judicially cognizable rights, such action could be challenged in a petition brought pursuant to 42 U.S.C. § 7607(b)(1).

APPROVAL STATUS OF THE 1974 APC–3

Having determined that the EPA had the authority to partially approve a revised regulation in a SIP, we must determine whether, in fact, the agency exercised that power as to the 1974 APC–3. The District Judge analyzed the language in the 1975 order and determined that the Administrator had disapproved the 15 minute exemption in the 1974 APC–3 but had otherwise approved the revised regulation. PSI contends that the District Court's factual finding was clearly erroneous[13] because the agency's order was ambiguous and never actually stated that any part of the 1974 APC–3 was approved.

The EPA's order is reproduced in Appendix B. The agency stated therein that the order consisted of the agency's final action on six submitted regulations and it discussed each of those submissions at some length. In addressing the 1974 APC–3, the Administrator noted that the 15 minute exemption was the most significant deviation from the original APC–3 and that, based on industry comments and other provisions in Indiana's SIP, the exemption was superfluous. Additionally, the Administrator determined that the exemption could interfere with the attainment and maintenance of particulate standards and noted that the state had not demonstrated to the contrary as required by 40 C.F.R. § 51.13(e)(1). The order then stated:

> Accordingly, APC–3 must be disapproved to the extent that the 15 minute exemption provision in section 1 fails to meet the requirements of § 51.13(e)(1) and 51.19(c).

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[13] Appellant notes that when:

"the factual determination is primarily a matter of drawing inferences from undisputed facts or determining their legal implications, appellate review is far broader than where disputed evidence and questions of credibility are involved," *Yorke* v. *Thomas Iseri Produce Co.*, 418 F.2d 811, 814 (7th Cir. 1969).

We agree that this broader standard of review is appropriate in this case.

The Administrator then noted that any exemptions granted pursuant to section 2(c) would have to be considered on a case by case basis and that administrative rulings clarifying certain terms in the regulation might require approval by the EPA prior to being effective. The penultimate paragraph of the order stated:

> "With the exception of the above-noted disapproval actions and material returned to the State or held in abeyance pending further review, the proposed revisions meet the substantive and procedural requirements of Section 110 of the Clean Air Act and 40 C.F.R. Part 51 and are hereby approved as revisions to the Indiana Implementation Plan, effective immediately."

Thus it appears clear that, with the exception of the disapproval action with respect to the 15 minute exemption, the Administrator approved the 1974 APC–3. PSI contends that the agency cannot be deemed to have approved any part of the 1974 APC–3 because that term was not actually used in the paragraphs which specifically addressed that regulation. However, appellant cities no authority to support the proposition that approvals must be stated in such a form in order to be effective. Additionally, in his discussion of the 1974 APC–3 the Administrator noted that exemptions granted under 2(c) of that regulation would require individual approval as might administrative rulings clarifying certain terms in the regulation. These comments would obviously be unnecessary if the entire regulation was being disapproved.

The appellant's vagueness argument is further weakened by the regulations which the agency promulgated contemporaneously with the October 1975 order. These regulations were published in the Federal Register with the order and serve to codify the Administrator's actions. The two regulations relevant to this discussion, 40 C.F.R. § 52.776(c) and § 52.792(a)[14] became part of the regulations reflecting the

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[14] This regulation was subsequently redesignated § 52.794(a), see 41 Fed.Reg. 3475 (Jan. 23, 1976).

approval status of the Indiana SIP. That set of regulations is prefaced by § 52.773 which states:

> "With the exceptions set forth in this subpart, the Administrator approves Indiana's plan for attainment and maintenance of the national standards."

Sections 52.776 and 52.792 address the status of the 1974 APC–3:

> § 52.776 Control Strategy. Particulate Matter.
>
> (c) APC–3 of Indiana's Air Pollution Control Regulations (visible emissions limitation) is disapproved insofar as the phrase "for more than a cumulative total of 15 minutes in a 24-hour period" will interfere with attainment and maintenance of particulate standards.[15]
>
> • • • • • •
>
> § 52.792 Source Surveillance.
>
> "The requirements of 51.19(c) of this chapter are not met by the phrase 'for more than a cumulative total of 15 minutes in a 24-hour period' contained in Section 1 of APC–3 of the Indiana Air Pollution Control Regulations."

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[15] PSI suggests that this regulation is ambiguous because "insofar as" is synonymous with "because," citing Webster's New International Dictionary 1255 (2d ed. 1949); American Heritage Dictionary 663 (1971). Thus appellant argues that this regulation supports its position that the Administrator disapproved the 1974 APC–3 in its entirety because the 15-minute exemption was unacceptable. However, the primary definition of "insofar as" is "to such extent or degree" Webster's New International Dictionary p. 1286 (2d ed. 1959); Funk & Wagnail's Standard College Dictionary p. 669 (1963); Thorndike-Barnhardt Dictionary p. 1019 (1963); American Heritage Dictionary of the English Language (1969). Additionally, in the body of the 1975 order the Administrator stated that "APC–3 must be disapproved to the extent that the 15-minute exemption failed to meet the requirements of § 51.13(e)(1) [which codifies control strategy requirements] and 51.19(c)." In this context, the interchanging of these synonymous adverbial phrases does not support a finding of ambiguity.

These regulations, considered in the context of their promulgation, unambiguously describe the Administrator's approval of the 1974 APC–3. Reading these regulations in conjunction with the October 1975 order, we are compelled to reach the same conclusion as the District Judge: the EPA partially approved the 1974 APC–3, disapproving only the 15 minute exemption. Accordingly, even under the liberal standard of review appropriate to this case, see ft. 13 *supra*, we will not disturb the factual findings of the District Court.

OTHER ARGUMENTS

[3,4] PSI presents certain arguments that relate to specific issues involved in the EPA's analysis of the 1974 APC–3 and its disapproval of the 15 minute exemption.[16] The EPA contends that appellant cannot attack the merits of the October 1975 order because the only means of obtaining such review would have been through a petition filed in the appropriate Court of Appeals within thirty days of the

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[16] For example, PSI argues that the 15-minute exemption was an "integral part" of Indiana APC–3 and therefore was not the proper subject matter for a partial disapproval, citing *City of Highland Park* v. *Train*, 519 F.2d 681, 689 (7th Cir. 1975). PSI also argues that, contrary to the conclusion in the October 1975 order, the 15-minute exemption was not superfluous. Additionally, appellant argues that it has been denied an opportunity to challenge the technical feasibility of the 1974 APC–3 as approved. We note that technical feasibility is not an issue for the EPA to consider when it evaluates a state submitted SIP; *Union Electric*, *supra*; and probably is not relevant when it promulgates provisions for a SIP, see *Cleveland Electric Illuminating Co.* v. *E.P.A.*, 572 F.2d 1150, 1164 (6th Cir. 1978). In any event, technical feasibility is relevant to the fashioning of a compliance order under 42 U.S.C. § 7413(a)(4), see *Union Electric*, 427 U.S. at 268, 96 S.Ct. at 2530; and may be relevant in enforcement proceedings, see *Buckeye Power, Inc.* v. *E.P.A.*, 481 F.2d 162, 173 (6th Cir. 1973); *Indiana & Michigan Electric Co.* v. *EPA*, 509 F.2d 839, 847 (7th Cir. 1975); see also *Union Electric*, 427 U.S. at 268 ft. 18, 96 S.Ct. at 2530–31 ft. 18.

agency's action,[17] 42 U.S.C. § 1857h–5(b)(1) (1970).[18] The failure of the appellant to file a timely petition in the proper forum deprives this court of jurisdiction over those issues, *Granite City Steel Comp.* v. *E. P. A.*, 501 F.2d 925 (7th Cir. 1974); *Getty Oil Comp.* v. *Ruckelshaus*, 467 F.2d 349 (3rd Cir. 1972); *Oljato Chapter of Navajo Tribe* v. *Train*, 515 F.2d 654 (D.C.Cir.1975); *Lloyd A. Fry Roofing Co.* v. *E. P. A.*, 554 F.2d 885 (8th Cir. 1977). PSI argues, however, that if the 15 minute exemption was validly disapproved then it was precluded from seeking judicial review of that action, thus raising the specter of a due process violation. In support of this contention, appellant relies on the language of the applicable review statute, 42 U.S.C. § 1857h–5(b)(1) (1970),[19] and *Utah*

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[17] The EPA also raises this argument in response to appellant's contentions that the agency lacks the power to partially approve revisions and that the language of the October 1975 order should not be construed as a partial approval of the 1974 APC–3. However, we do not believe that all issues regarding the October 1975 order are beyond scrutiny. PSI's argument as to the proper interpretation of the agency's action is not barred since it merely raises a factual issue as to the operative effect of that order. In other words, the issue is not why the EPA did what it did, but what did the EPA, in fact, do. In this regard, the general issue of the Administrator's power to partially approve a revision has to be resolved in order for the Court to determine whether the order can be validly construed as an exercise of such a power. However, as we conclude in this section of the opinion, issues relating to the Administrator's rationale for partially approving the 1974 APC–3 are not properly before the Court.

[18] In the 1977 amendments to the Clean Air Act, this time period was extended to sixty days and the statute was redesignated, see 42 U.S.C. § 7607(b)(1). See also ft. 19.

[19] That statute provided that a

"... petition for review of the Administrator's action in approving or promulgating any implementation plan ... may be filed only in the United States Court of Appeals for the appropriate circuit

(Footnote continued on next page)

International, Inc. v. *E. P. A.*, 478 F.2d 126 (10th Cir. 1973). We conclude that *Utah International* is distinguishable and that appellant was not denied an opportunity for judicial review of the agency's action.

In *Utah International*, the EPA had issued an order partially approving the New Mexico SIP. Subsequently, the agency issued another order disapproving a part of the implementation plan and proposing new regulations to replace those provisions. Utah International, Inc. sought review of the latter order and the court determined that it lacked jurisdiction under 42 U.S.C. § 1857h–5(b)(1):

> The statute providing for judicial review of orders of the EPA relating to implementation plans is obviously designed to provide for judicial review of final administrative action. Hence, an order approving a state plan is subject to review, for by approving a state plan the EPA thereby places the state plan into effect ... Accordingly, in the instant case until such time as the EPA promulgates its own plan ... there is no final and applicable order under the statute. It is on this basis that we conclude that the present petition to review is not permitted by 42 U.S.C. § 1857h–5(b)(1) and that we are without jurisdiction. 478 F.2d at 127–128.

In the instant case, however, the agency's October 1975 order was clearly a final administrative action. The order stated it was "the final agency action on APC–3 [and five other regulations] ..." and it is evident from the last paragraph that it operated to put in effect certain new and revised regulations of the Indiana SIP. Thus, the holding in *Utah International* does not apply to this case.

... within 30 days from the date of such promulgation or approval ..."

The scope of judicial review was extended in 1977 to include "any other final action of the Administrator under this chapter (including any denial or disapproval by the Administrator under subchapter I [relating, *inter alia*, to approval actions on SIPs] of this chapter) ..." 42 U.S.C. § 7607(b)(1).

Appellant's argument is without merit for another reason. The potential injury to PSI arising out of the October 1975 order did not result from the disapproval of the 15 minute exemption, but from the approval *and concomitant enforceability* of APC–3 with that exemption excised. Thus if appellant wanted to seek review of the October 1975 order it should have filed a petition contesting the Administrator's approval action, as specifically authorized by 42 U.S.C. § 1857h–5(b)(1) (1970).

This type of petition for review was filed and heard in *Big Rivers Electric Corp.* v. *E. P. A.*, 523 F.2d 16 (6th Cir. 1975), *cert. den.* 425 U.S. 934, 96 S.Ct. 1663, 48 L.Ed.2d 175 (1976).[20] In that case, the EPA issued an order approving the Kentucky SIP with the exception of one provision which was specifically disapproved. The Tennessee Valley Authority and several electrical utilities companies sought review of that order claiming that the agency's disapproval action was not authorized and, alternatively, that it was an abuse of discretion. The petitioners did not raise any issue as to the approval portions of the EPA's order. The court raised, *sua sponte*, the issue of its jurisdiction to review a disapproval action under 42 U.S.C. § 1857h–5(b)(1) (1970):

> There is no statutory provision for review of an action disapproving a plan or a portion thereof because disapproval is not a final administrative action [citing *Utah International*]. However, all parties including the Administrator have treated his action as a final approval of the Kentucky Plan with the disapproved portion eliminated, and we treat the proceedings as a petition for review of the approval of the Plan. 523. F.2d at p. 18.

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[20] We note that the Court of Appeals' decision in Big Rivers was rendered prior to the October 1975 order in issue herein.

Thus, we conclude that PSI could have filed a petition for review of the October 1975 order under 42 U.S.C. § 1857h-5(b)(1) (1970).[21] In the context of that appeal, appellant could have addressed any issue arising out of the disapproval of the 15 minute exemption. Therefore, having dispersed the specter of a due process violation, we must reiterate that we lack jurisdiction to entertain appellant's attack on the merits of the October 1975 order.

CONCLUSION

[5] Accordingly, we conclude that the 1974 APC-3 is federally enforceable with the 15-minute exemption excised. Therefore, the applications for the inspection warrants presented sufficient probable cause of violations of the federally enforceable Indiana SIP to justify their issuance to the EPA. PSI's arguments that the inspections, as authorized and executed, were overly broad were thoroughly analyzed and properly rejected by the District Judge, and we hereby adopt that portion of his opinion, 509 F.Supp. 720, 724-726.

Accordingly, the judgment of the District Court is affirmed.

APPENDIX A

325 IAC 1-3-1 Limitation on emissions

Authority: IC 13-1-1-4; IC 13-7-5-1

Affected: IC 13-1-1-1; IC 13-1-1-4

Sec. 1. Limitation. No person shall operate any equipment so as to produce, cause, suffer, or allow smoke or other visible emissions in excess of 40 per-cent opacity (Ringelmann No.

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[21] Additionally, we note that the burden was on the PSI to seek review if it had an objection to the propriety of the EPA's action, *Ohio Environmental Council* v. *United States District Court*, 565 F.2d 393, 396-397 (6th Cir. 1977), see also *Train*, 421 U.S. at 92, 95 S.Ct. at 1488.

2) for more than a cumulative total of fifteen minutes in a 24-hour period except as allowed in Sec. 2 and Sec. 4 [*325 IAC 1-3-2 and 325 IAC 1-3-4*]. Opacity values shall not be considered valid, unless observed and determined by a qualified person. Visible emission shall exclude uncombined water. (*Air Pollution Control Board: APC 3. Sec 1; filed Oct 7, 1974, 10:55 am: Rules and Regs. 1975, p. 122*)

Cited in: 325 IAC 1-3-2—325 IAC 1-3-4.

325 IAC 1-3-2 Temporary exceptions from compliance.

Authority: IC 13-1-1-4; IC 13-7-5-1
Affected: IC 13-1-1-1; IC 13-1-1-4; IC 13-7-10-3

Sec. 2. Temporary Exceptions from Compliance. (a) Fire Starting. When building a new fire in a boiler, smoke no darker than 60 percent opacity may be emitted for a period not to exceed ten minutes on one occasion in any 24-hour period.

(b) Boilers. When cleaning a fire in a boiler or blowing tubes, smoke which is not darker than 60 percent opacity may be emitted for periods not exceeding five minutes in any 60-minute period. Such emissions shall not be permitted on more than six occasions during any 24-hour period.

(c) Other. That the time and opacity limitations set forth in Sec. 1 [*325 IAC 1-3-1*], Sec. 2(a) and Sec. 2(b) [*subsections (a) and (b) of this section*] may be exceeded for reasonable brief periods of time by the specific terms of time and opacity limitations set forth in an operation permit required under APC 19 [*325 IAC 1-16*]. The exception may be granted if:

(i) The exception is requested, and

(ii) it is shown that no alternative control method is available, and

(iii) it is not possible for the applicant to comply with Sec. 1 [*325 IAC 1-3-1*], Sec. 2(a) and Sec. 2(b) [*subsections (a) and (b) of this section*].

Further, that said agency is then authorized to issue an operation permit with said permit setting forth, in detail, the specific terms of the time and opacity limitations granted. (*Air Pollution Control Board; APC 3, Sec 2; filed Oct 7, 1974, 10:55 am: Rules and Regs. 1975, p. 123*)

Cited in: 325 IAC 1-3-1; 325 IAC 1-3-3; 325 IAC 1-3-4.

325 IAC 1-3-3 Evidence of violations; single stacks and multiple stacks

Authority: IC 13-1-1-4; IC 13-7-5-1
Affected: IC 13-1-1-4; IC 13-7-5-1

Sec. 3. Violation of Other Regulations. (a) Single Stacks. A violation of Sec. 1 [*325 IAC 1-3-1*] of this Regulation shall constitute prima-facie evidence of a violation of any applicable particulate emission control regulation of the Board, but may be refuted by a stack emission test conducted in accordance with the Board's Source Sampling Policy, or other evidence acceptable to the Board. No violation shall have occurred if it can be shown the emissions are exempt under Section 2 [*325 IAC 1-3-2*] of this Regulation or due to a malfunction providing the requirements of Section 4 [*325 IAC 1-3-4*] are adhered to.

(b) Multiple Stacks. For facilities with multiple stacks, each stack must comply separately with the opacity limitations of Sec. 1 [*325 IAC 1-3-1*], except as allowed in Sec. 2 [*325 IAC 1-3-2*], even though the multiple stacks, as a group, are in compliance with the limitations of the Board's applicable particulate emission control regulations. (*Air Pollution Control Board; APC 3, Sec 3; filed Oct 7, 1974, 10:55 am: Rules and Regs. 1975, p. 123*)

325 IAC 1-3-4 Malfunctions

Authority: IC 13-1-1-4; IC 13-7-5-1
Affected: IC 13-1-1-1; IC 13-1-1-4; IC 13-1-1-7

Sec. 4. Malfunctions. (a) Malfunction. For the purpose of this regulation [*325 IAC 1-3*] shall mean any sudden,

unforeseen, or unavoidable failure of air pollution control equipment, or combustion or process equipment to operate in a normal manner and in compliance with all applicable regulations of the Board.

(b) Reporting. When a malfunction of any combustion or process operation of air pollution control equipment lasts more than one hour, the Technical Secretary shall be notified by telephone, or telegraph, as soon as practicable, but in no event later than four daytime business hours after the beginning of said occurrence. Information of the scope and expected duration of the malfunction shall be provided. A record shall be kept of all mafunctions, including start ups, or other events which result in violations of Sec. 1 and Sec. 2 [*325 IAC 1-3-1 and 325 IAC 1-3-2*], and such record shall be made available to the Board upon request.

(c) Maintenance. Source operators are responsible for operating and maintaining all equipment and processes in compliance with all applicable regulations of the Board. The Board recognizes that malfunctions may occur for many and varied reasons. Curtailment of operations shall be required, except as covered in Sec. 4(d) [*subsection (d) of this section*], if the source is not in compliance at least 90 percent of the operating time over the most recent 12-month period. Where the record shows repeated malfunctions exceeding 5 percent of the normal operational time attributed to improper maintenance of faulty equipment, the Board may require that the maintenance program be improved or that the defective or faulty equipment be replaced. To eliminate long term malfunction periods resulting from delays in obtaining replacement parts, an adequate stock of replacement parts shall be maintained.

(d) Malfunction Emission Reduction Program. Malfunctions of air pollution control equipment, and combustion and process equipment may result in increased emissions such that the air quality standards may be violated or that health hazards may occur. It is recognized that a variety of steps, including complete shut down of the equipment involved, can

be taken to reduce the amount of emissions to a reasonable value. Any source that has an emission rate in excess of 2000 pounds per hour of any pollutant following a malfunction, or because of the health hazard created by a lesser emission rate than that specified, shall submit a malfunction emission reduction program. Such a malfunction emission reduction program shall be submitted to the Board within 60 days after promulgation of this regulation [*325 IAC 1-3*] for its approval. Documentation shall include, but not be limited to, the normal operating emission rate, the malfunction emission rate, and the program proposed to reduce emissions to a reasonable emission rate. The program shall be based on the best practical estimates of type and number of malfunctions experienced during the past 12 months of normal operation, and the scope and duration of such malfunctions. (*Air Pollution Control Board; APC 3, Sec. 4; filed Oct 7, 1974, 10:55 am: Rules and Regs. 1975, p. 123*)

Cited in: 325 IAC 1-3-1; 325 IAC 1-3-3.

325 IAC 1-3-5 Federal new source performance standards

Authority: IC 13-1-1-4; IC 13-7-5-1

Affected: 13-1-1-1

Sec. 5. Federal New Source Performance Standards. In addition to the requirements set forth herein, all new sources for which federal standards have been promulgated shall comply with the applicable portions of the Federal New Source Performance Standards 40 CFR Part 60. (*Air Pollution Control Board; APC 3, Sec. 5; filed Oct 7, 1974, 10:55 am: Rules and Regs. 1975, p. 124*)

APPENDIX B

Title 40—Protection of the Environment

CHAPTER 1—ENVIRONMENTAL PROTECTION AGENCY

[FRL 446—5]

PART 52—APPROVAL AND PROMULGATION OF STATE IMPLEMENTATION PLANS

Indiana—Approval of Plan Revisions

Pursuant to section 110 of the Clean Air Act, the State of Indiana submitted to the Administrator of the United States Evironmental Protection Agency an implementation plan on January 31, 1972 to achieve the National Ambient Air Quality Standards. The plan was approved by the Administrator on May 31, 1972 (37 FR 10842) with several exceptions. Subsequent to the May 31, 1972 action, the State submitted amended sulfur dioxide, hydrocarbon, and carbon monoxide regulations for stationary sources which the Administrator approved on May 14, 1973 (38 FR 12698).

Recently, the Indiana Air Pollution Control Board after public notice and hearing adopted revisions to regulations APC–13, APC–15, APC–16, and APC–17, and adopted new regulations APC–18, APC–20, and APC–22. On March 7, 1974, the Technical Secretary of the Air Pollution Control Board (APCB), acting for the Governor of Indiana, submitted to the Regional Administrator new regulations APC–18 and APC–20. On October 3, 1974 the Technical Secretary submitted revised regulations APC–16, APC–17, and new regulation APC–22. On November 8, 1974, the Technical Secretary submitted revised regulations APC–3 and APC–15, and on December 5, 1974, submitted a revised APC–13. With the revised regulations, the State submitted a technical support document describing the rationale for the changes to the regulations.

On May 2, 1975 the Regional Administrator of the U.S. EPA, Region V, published for public comment these proposed revisions to the regulations contained in the Indiana State

Implementation Plan (SIP). The regulatory changes affect the control of five criteria pollutants: total suspended particulates, sulfur dioxide, hydrocarbons, nitrogen oxides, and carbon monoxide. Regulations establishing timetables for particulate control (APC–18) and controlling fugitive dust (APC–20) were included in the notice. Most significant, however, was a regulation (APC–22) which classifies counties within Indiana according to the need for control of emissions from sources located in each county, in fact, a wholesale revision of the applicable control strategy for all pollutants.

In the rulemaking proposal, eleven counties in Indiana were singled out for being unacceptably classified by APC–22 for purposes of sulfur dioxide controls set forth in APC–13, based on EPA's preliminary review of the State's technical support document. The EPA review of the technical support document supporting the proposed rulemaking indicated that an "A" Classification for those counties might be more appropriate. Public utility companies have submitted air quality, emission and meteorological data to demonstrate that a "C" classification would be appropriate in most counties. As a result of a meeting between EPA and State officials, the State has undertaken a reassessment of the APC–22 classification for the eleven counties based on a Federally approved methodology involving use of computerized dispersion modelling in which sources are examined for their impact on air quality. This work is currently under review in conjunction with other submitted data, by the regional office and final rulemaking action on APC–13 and pertinent portions of APC–22 will take place shortly.

This notice finalizes action on APC–3, APC–16, APC–17, APC–18, APC–20, and APC–22, insofar as it classifies counties for purposes of controlling total suspended particulates, carbon monoxide, and nitrogen dioxide. Final action on APC–13, APC–15, and the APC–20 classification of counties for sulfur dioxide and hydrocarbon control will be forthcoming.

New APC–3, the visible emissions regulation, varies from the approved regulation in several respects, the most signifi-

cant of which is the introduction of a 15-minute exemption period in each 24-hour period. The power companies submitted comments to the effect that such an exemption is necessary for them when starting fires or cleaning units. Since sections 2(a) and 2(b) of APC–3 already provide an exemption to visible emission requirements for fuel-burning sources in such circumstances, this comment appears to be superfluous. Generally, visible emission regulations correspond to the surveillance requirement set forth at 40 CFR 51.19(c) and section 3 of APC–3 indicates that such was the intent of Indiana. However, certain intermittent sources, such as coke batteries and roof monitors, may cause gross visible emissions and remain within the exempted time limits. For such sources at least, APC–3 would be ineffective and impractical as a surveillance technique if indeed it could be deemed available. Such being the case, it is incumbent upon the State to demonstrate that failure of intermittent sources to comply with APC–3 during the exempted time period would not result in an interference with attainment and maintenance of the standards. [40 CFR 51.13(e)(1)]. The State has failed to present such a demonstration. Accordingly, APC–3 must be disapproved to the extent that the 15-minute exemption provision in section 1 fails to meet the requirements of §§ 51.13(e)(1) and 51.19(c). It should also be noted that EPA will not regard itself as bound by exemptions granted by the Board pursuant to section 2(c). Such exemptions must be considered on a case by case basis for impact on attainment and maintenance of standards.

Other comments from industry and the utilities criticized APC–3 for vagueness and generally conveyed a need for clarification of terms. EPA is concerned about the confusion caused by the regulation but believes moist difficulties can be resolved by administrative resolution. Such resolutions to the extent that EPA considers them substantive changes would need to be reviewed by EPA for consistency with the implementation plan before becoming effective.

New APC–16, control of carbon monoxide (CO) emissions from stationary sources, in conjunction with the classification of counties in APC–22 for purposes of CO control, effectively

removes all existing stationary sources of CO from the applicable control strategy. A review of the last several years of air quality data showed few violations of the standards. The small number of stationary CO sources in Indiana and the fact that the bulk of CO emissions are mobile source initiated are reasons for EPA's approval of this strategy revision. APC–16 will require control of new stationary CO sources to assist in maintenance of the standards.

New APC–17 control of nitrogen dioxide [NO_2] emissions from stationary sources, in conjunction with the classification of counties in APC–22 for purposes of NO_2 control, effectively removes all stationary sources of NO_2 from the applicable control strategy. EPA's reclassification of AQCR's placed all but the Indiana portion of the major metropolitan Chicago AQCR in attainment status (39 FR 16344, May 8, 1974). The available air quality data in the Northwest Indiana Area indicates no standard violations. Accordingly, EPA will approve this strategy revision. APC–17 will require control of new stationary NO_2 sources to assist in maintaining the standard and in reference to fossil fuel generators is consistent with Federal New Source Performance Standards for emissions of nitrogen dioxide (40 CFR Part 60.44).

APC–18 represents a series of compliance schedules affecting the various sources of particulate matter. In all cases, the final compliance date was on or before May 31, 1975. Since approval of APC–18 at this late date would be purely academic, EPA will request the State to withdraw the regulation as a plan revision in accordance with comments submitted by the Technical Secretary of the APCB.

APC–20 addresses the control of fugitive dust emissions. Comments received from industry indicated a general dissatisfaction with the regulation because of vagueness and unenforceability. While EPA recognizes the desirability of including a fugitive dust emission limitation in an air quality implementation plan, the State has been advised of our reservations concerning the inclusion of a vague or ambiguous regulation in the Indiana Implementation Plan. State officials have indicated a willingness to clarify the ambigui-

ties. In the interim EPA will approve APC–20 with the exception of section 2(d) relating to visible emission violations. State personnel have indicated that no person has ever been cited for violation solely of section 2(b). Accordingly, EPA will disapprove section 2(D) of APC–20 as unenforceable. This rulemaking will be effective immediately because no additional substantive requirements are imposed on parties.

APC–22 classifies all counties in the State as A, B, or C for each criteria pollutant. While EPA is not satisfied with the State's technical support of classifications for CO and NO_2, the priority county ratings for these two pollutants will be approved for reasons discussed above. Classifications for particulate, however, are unsupportable for the following reasons:

(1) Data to support the regulation is inadequate:

(2) Attainment of the National Ambient Air Quality Standards has not been addressed:

(3) Maintenance of the National Ambient Air Quality Standards has not been addressed.

Thus, this classification fails to meet the requirements of 40 CFR 51.3 and accordingly is disapproved.

Final rulemaking action on the ozone and sulfur dioxide county classifications will take place at the same time as actions of APC–15 and APC–13.

With the exception of the above-noted disapproval actions and material returned to the State or held in abeyance pending further review, the proposed revisions meet the substantive and procedural requirements of Section 110 of the Clean Air Act and 40 CFR Part 51 and are hereby approved as revisions of the Indiana Implementation Plan, effective immediately.

A technical support document discussing the background for the decisions noted above is available for inspection in the Region V office of the U.S. Environmental Protection Agency, 230 South Dearborn, Chicago, Illinois 60604, and the Indiana

State Air Pollution Control Board, State Board of Health, 1330 West Michigan Street, Indianapolis, Indiana 46206.

(42 USC 1857c–5(a))

Dated: October 21, 1975.

JOHN QUARLES,
Acting Administrator.

Part 52 of Chapter I, Title 40, of the Code of Federal Regulations is amended as follows:

1. Section 52.770 is amended by adding paragraph (d)(2) as follows:

§ 52.770 Identification of plan.

* * * * * * *

(d) * * *

(2) March 7, 1974, October 3, 1974 and November 8, 1974 the Technical Secretary of the Air Pollution Control Board acting for the Governor of Indiana.

(2) Section 52.771 is amended by adding paragraph (b) as follows (the existing unlettered paragraph becomes paragraph (a)):

§ 52.771 Classification of regions.

* * * * * * *

(b) The requirements of 51.3(a) of this chapter are not met by the classification of counties in APC–22 for the purposes of attainment and maintenance of the total suspended particulate ambient air quality standards.

3. Section 52.776 is amended by adding paragraph (C) as follows:

§ 52.776 Control strategy. Particulate matters.

* * * * * * *

(c) APC–3 of Indiana's Air Pollution Control Regulations (visible emission limitation) is disapproved insofar as the phrase "for more than a cumulative total of 15 minutes in a 24-hour period" will interfere with attainment and maintenance of particulate standards.

4. Section 52.781 is amended by adding paragraph (e) as follows:

§ 52.781 Rules and regulations.

* * * * * * *

(e) Section 2(d) of APC–20. Fugitive Dust Emissions, is disapproved because it is unenforceable within the terms of the regulation.

5. Section 52.792 is added as follows:

§ 52.792 Source surveillance.

(a) The requirements of 51.19(c) of this chapter are not met by the phrase "for more than a cumulative total of 15 minutes in a 24-hour period" contained in Section 1 of APC–3 of the Indiana Air Pollution Control Regulations.

[FR Doc. 75–28779 Filed 10–24–75; 8:45 am]

PUBLIC SERVICE COMPANY OF INDIANA, INC.,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and Douglas M. Costle, Individually and as Administrator of the Environmental Protection Agency.

No. IP 80—332—C.

United States District Court,
S. D. Indiana,
Indianapolis Division.

Jan. 12, 1981.

Electric utility sought declaratory and injunctive relief, as well as return of various documents, in connection with two allegedly unconstitutional and extrastatutory administrative inspections of two of its facilities by representatives of Environmental Protection Agency. The District Court, Noland, J., held that: (1) warrants were adequately supported by applications and affidavits submitted by EPA; (2) regulation was valid and enforceable part of Indiana's state implementation plan, and thus asserted violations of regula-

tion constituted valid and viable element of applications underlying administrative search warrants; (3) scope of search warrants was not overbroad; (4) photographs taken by EPA employee were not improper; and (5) no abuse of privileges conferred by search warrants occurred in connection with request documents.

Judgment for defendants.

1. Health and Environment Key No. 25.6(9)

Search warrant was required, absent consent, prior to entry upon electric utility's premises by employees of Environmental Protection Agency. Clean Air Act, §§ 101-327, 42 U.S.C.A. §§ 7401-7626; 28 U.S.C.A. §§ 1331, 2201, 2202; 5 U.S.C.A. § 702.

2. Inspection Key No. 5

Probable cause standard for administrative inspection warrant is somewhat less stringent than that required in criminal matters.

3. Inspection Key No. 5

Whether agency inspection is pursuant to preestablished administrative plan or result of specific employee complaints is immaterial insofar as level of probable cause required to support administrative inspection warrant is concerned.

4. Health and Environment Key No. 25.6(9)

Administrative inspection search warrants issued by magistrate were adequately supported by applications and affidavits submitted by Environmental Protection Agency, where documents set forth Agency's broad statutory monitoring and inspection powers and outlined bases for Agency's belief that violations of opacity and particular control provisions were occurring at electric utility's facilities and where application recited concern over violations of particulate emissions standards and results of various stack tests conducted at facility in support of request for authorization to enter and inspect premises. U.S.C.A. Const. Amend. 4; Clean Air Act, § 114(a), 42 U.S. C.A. § 7414(a).

5. Inspection Key No. 5

Administrative inspection warrant application need not be accompanied by actual documentation of alleged past violations, and magistrate considering application is entitled to rely upon verity of assertions contained therein. U.S.C.A. Const. Amend. 4; Clean Air Act, § 114(a), 42 U.S.C.A. § 7414(a).

6. Health and Environment Key No. 25.6(4)

Regulation dealing with visible emissions standards was valid and enforceable part of Indiana's state implementation plan, even though Administrator of EPA had not approved provision purporting to allow 15-minute exemption in each 24-hour period for emissions in excess of 40% opacity, and thus asserted violations of regulation constituted valid and viable element of applications underlying administrative inspection warrants. Clean Air Act, § 114, 42 U.S. C.A. § 7414.

7. Searches and Seizures Key No. 7(10)

Scope of administrative inspection warrant, which allowed entry into coal unloading area, coal stockpile, boilers, turbines, control instrumentation, pollution control equipment, stacks, and ash disposal systems, was authorized by statute and was not overly broad or unreasonably disruptive under Fourth Amendment, where inspections necessitated no plant shutdowns or loss of earning capacity and involved plant and facilities of only one employer. Clean Air Act, § 114, 42 U.S.C.A. § 7414; U.S.C.A. Const. Amend. 4.

8. Health and Environment Key No. 25.6(9)

Photographs taken during administrative inspection search of electric utility by Environmental Protection Agency employees were not improper, where photographs were intended merely as aid to recollection of layout and organization of facilities insofar as equipment bearing on opacity and particulate requirements was concerned. Clean Air Act, § 114(a)(2), (c), 42 U.S.C.A. § 7414(a)(2), (c).

9. Health and Environment Key No. 25.6(9)

No abuse of privileges conferred by administrative inspection warrant occurred in connection with documents re-

quested thereby, even though documents and materials requested were not stored on premises of searched facilities, where documents were ones which were obtainable under Clean Air Act and which Environmental Protection Agency reasonably believed would be on premises and where manager of facility agreed to see that additional materials were delivered to EPA. Clean Air Act, § 114, 42 U.S.C.A. § 7414.

10. Health and Environment Key No. 25.6(9)

Fact that notice of violation ultimately received by electric utility apparently arose out of continuous monitoring data and other information in possession of Environmental Protection Agency prior to administrative inspections and fact that no violations of clean air provisions were discovered during challenged inspection tours were irrelevant to conclusions reached by district court with regard to validity of administrative search warrants themselves. Clean Air Act, § 114, 42 U.S.C.A. § 7414.

Gregory A. Troxell, House Counsel (P.S.C.I.), Plainfield, Ind., Peter J. Rusthoven and Bryan G. Tabler, Barnes, Hickam, Pantzer & Boyd, Indianapolis, Ind., for plaintiff.

Virginia Dill McCarty, U. S. Atty., Charles Blau, Asst. U.S. Atty., Indianapolis, Ind., for defendants.

MEMORANDUM OF DECISION

NOLAND, District Judge.

This action arises under the provisions of the Clean Air Act, 42 U.S.C. §§ 7401–7626. Plaintiff seeks declaratory and injunctive relief, as well as the return of various documents in the possession of the defendant, in connection with two allegedly unconstitutional and extrastatutory administrative inspections of two of its facilities by representatives of the Environmental Protection Agency (EPA) on January 8 and 9, 1980. The cause came before the Court on June 9, 1980, for argument on plaintiff's request for preliminary injunctive relief, at which time the parties agreed to additionally treat

the proceeding as a hearing on the merits so as to facilitate a final decision by the Court. The matter is thus ripe for decision. Plaintiff Public Service Company of Indiana, Inc. (PSI) is a corporation organized and existing under the laws of the State of Indiana, engaged in the generation, transmission, distribution and sale of electric energy. Defendant United States Environmental Protection Agency (EPA) is an agency of the federal government. Defendant Costle is the duly commissioned acting Administrator of the EPA. The Court has jurisdiction over the subject matter herein by virtue of 28 U.S.C. § 1331, 5 U.S.C. § 702, and 28 U.S.C. §§ 2201-02. For the reasons which follow, the Court has concluded that plaintiff is not entitled to injunctive or declaratory relief, and that the challenged actions of the EPA were proper.

I. FACTUAL BACKGROUND AND CLAIMS

The facts, in summary fashion, are as follows. On March 6, 1979, David Schulz, an environmental engineer and authorized inspector for the EPA, presented his credentials and requested permission to enter and inspect the premises owned by PSI in Gibson County, Indiana, known as Gibson Station. His request was refused, in part because Mr. Schulz declined to sign a "Visitors' Admission Agreement" which included a waiver of liability. On January 7, 1980, the EPA applied for and received an inspection warrant upon the affidavit of Mr. Schulz from U.S. Magistrate J. Patrick Endsley, for the Southern District of Indiana. On January 8, 1980, Mr. Schulz, accompanied by Mr. Dihu, an EPA inspector and visible emissions observer, and a United States Marshal, executed the warrant and conducted an inspection of the Gibson Station facility. On January 9, 1980, PSI moved to quash or modify the inspection warrant and requested a hearing.

Similar events transpired at PSI's Wabash River Generating Station, located near Terre Haute, Indiana. On May 17, 1979, EPA employees Louise Gross and Henry Modetz requested permission to enter and inspect the Wabash River

Station. As in the case of the Gibson Station, entry was denied upon the inspectors' refusal to sign the visitors' admission agreement. Upon the affidavit of Ms. Gross and David Shulz, an inspection warrant was issued on January 7, 1980, by Magistrate Endsley, and executed on January 9, 1980, by Mr. Schulz and Mr. Dihu. On January 10, 1980, PSI moved to quash or modify the warrant.

Following a hearing on the two motions on January 18, 1980, Magistrate Endsley issued an order denying PSI's motions and declaring the warrants to be valid and in conformance with Fourth Amendment requirements. He additionally held that EPA inspectors were entitled to photograph plant conditions during an authorized inspection, and that entry of EPA officials upon PSI premises could not be conditioned upon the signing of an indemnity and waiver of liability agreement.

The present action was thereafter filed on April 7, 1980, seeking declaratory and injunctive relief. Specifically, PSI contends and seeks a judgment declaring that (1) Indiana Regulation APC-3 has not been properly approved by the EPA and is therefore not federally enforceable; (2) there was no probable cause for issuance of the warrants; (3) the warrants were not reasonably limited in scope and hence violate the Fourth Amendment; and (4) the warrants cannot properly permit seizure or demand of documents stored at locations other than those to which a particular warrant is directed. PSI additionally seeks to have the Court enjoin future inspections and EPA enforcement actions resulting from information obtained pursuant to the warrants challenged herein, as well as order all documents and photographs obtained in the course of the challenged inspections returned.

II. DISCUSSION

[1] The applications for the warrants forming the basis of the present action set forth the statutory basis for EPA entry upon PSI property and inspection thereof, Section 114(a) of the Clean Air Act, 42 U.S.C. § 7414(a). Section 114(a), in pertinent part, provides:

(1) The Administrator may require any person who owns or operates any emission source or who is subject to any requirement of this chapter . . . to (A) establish and maintain such records, (B) make such reports, (C) install, use, and maintain such monitoring equipment or methods, (D) sample such emissions (in accordance with such methods, at such locations, at such intervals, and in such manner as the Administrator shall prescribe), and (E) provide such other information as he may reasonably require; and

(2) the Administrator or his authorized representative, upon presentation of his credentials—

(A) shall have a right of entry to, upon, or through any premises of such person or in which any records required to be maintained under paragraph (1) of this section are located, and

(B) may at reasonable times have access to and copy any records, inspect any monitoring equipment or method required under paragraph (1), and sample any emissions which such person is required to sample under paragraph (1).

The statute allows the EPA to require extensive monitoring and reporting of emissions data, and would appear to permit warrantless entry upon regulated premises for purposes of investigating compliance with EPA standards. However, with its decision in *Marshall* v. *Barlow's Inc.*, 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978), the Supreme Court made it clear that a warrant was required, absent consent to entry and inspection, in the face of similar OSHA legislation purporting to allow warrantless entry. It is clear that under the facts and statutes involved in the present action a warrant was equally required, absent consent, prior to entry upon the PSI premises.

[2, 3] The level of probable cause required to support an administrative inspection warrant has been the subject of considerable discussion in recent years. It is clear that the probable cause standard for such a warrant is somewhat less stringent than that required in criminal matters. As the court stated in *Barlow's supra:*

> Whether the Secretary proceeds to secure a warrant or other process, with or without prior notice, his entitlement to inspect will not depend on his demonstrating probable cause to believe that conditions in violation of OSHA exist on the premises. Probable cause in the criminal law sense is not required. For purposes of an administrative search such as this, probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation but also on a showing that "reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment]." *Camara* v. *Municipal Court*, 387 U.S. 523, at 538, 87 S.Ct. 1727, at 1735, 18 L.Ed.2d 930.

436 U.S. at 320–21,98 S.Ct. at 1824–1825, quoted in *Burkart Randall Division of Textron, Inc.* v. *Marshall*, 625 F.2d 1313, 1316 (7th Cir. 1980). *See also See* v. *City of Seattle*, 387 U.S. 541, 87 S.Ct. 1737, 18 L.Ed2d 943 (1967). Whether an agency inspection is pursuant to a preestablished administrative plan or the result of specific employee complaints is immaterial insofar as the level of probable cause required to support a warrant is concerned. *Burkart, supra; In the Matter of Establishment Inspection of Gilbert & Bennett Mfg. Co.*, 589 F.2d 1335 (7th Cir. 1979), *cert. denied* 444 U.S. 884, 100 S.Ct. 174, 62 L.Ed.2d 113 (1979).

[4] Applying the more flexible administrative probable cause standards to the facts of the present case, the Court has concluded that the warrants issued by Magistrate Endsley were adequately supported by the applications and affidavits submitted by the EPA. These documents set forth the agency's broad statutory monitoring and inspection powers, and outlined the bases for the agency's belief that violations of opacity and particulate control provisions were occurring at the Gibson and Wabash River Stations. Specifically, the application pertaining to the Gibson Station stated:

> The determination to inspect said premises is generally based on continuous opacity monitoring data, submitted quarterly by Public Service Company of Indiana, Inc. to the Indiana Air Pollution Control Division, which indicates

that the Gibson Generating Station exceeded the limits provided by the Indiana State Implementation Plan Regulation APC–3 (visible emissions standards) for 198 of the first 273 days of 1979 (January 1 to September 30, 1979). Continuous opacity monitoring data for the last quarter of 1979 (October 1 to December 31, 1979) will not be available until February of 1980. Access to the Gibson Station is now required to conduct additional tests and inspections to assess the compliance status of the Gibson Station.

Similarly, the application for a warrant for inspection of the Wabash River Station recited concern over violations of APC–3 and APC–4R, which deals with particulate emissions standards. In addition to the continuous monitoring data forming the basis of the suspected violations at Gibson Station, the application recited the results of various stack tests conducted at the Wabash River Station in support of its request for authorization to enter and inspect the premises.

[5] Such allegations are clearly sufficient on their face as a basis for issuance of an administrative inspection warrant. A warrant application need not be accompanied by actual documentation of alleged past violations, and a magistrate considering the application is entitled to rely upon the verity of the assertions contained therein. *See Marshall* v. *Milwaukee Boiler Manuf. Co., Inc.*, 626 F.2d 1339, 1345 (7th Cir. 1980). Plaintiff argues that the actual instances of noncompliance with the opacity and particulate requirements are far less than the figures presented in the applications would indicate, inasmuch as some of these are excused exceedences under the Indiana regulations. However, even assuming the existence of a much smaller number of exceedences, the facts in this case, in the context of Section 114 and the overall purpose of the Clean Air Act, would support the warrants issued. In short, there was sufficient probable cause to justify issuance of the challenged warrants.

[6] PSI has additionally challenged the validity of Indiana Regulation APC–3, suspected violation of which constituted the major basis for the entry and inspection, and past

violations of which comprised the bulk of the allegations in the warrant applications. APC–3, which deals with visible emissions standards, was submitted to the EPA Administrator in amended form in 1974 for approval as part of Indiana's State Implementation Plan (SIP). In the October 28, 1975 *Federal Register*, the Administrator approved amended APC–3 with the exception of a provision purporting to allow a 15-minute exemption in each 24-hour period for emissions in excess of 40% opacity. In the language of the Administrator,

> APC–3 must be disapproved to the extent that the 15-minute exemption provision in section 1 fails to meet the requirements of §§ 51.13(e)(1) and 51.19(c).
>
> . . . . .
>
> With the exception of the above-noted disapproval actions and material returned to the State or held in abeyance pending further review, the proposed revisions meet the substantive and procedural requirements of Section 110 of the Clean Air Act . . . and are hereby approved as revisions to the Indiana Implementation Plan, effective immediately.

40 Fed.Reg. 50,003 (1975). This language leads the Court to conclude that the Administrator did in fact approve, with the minute exception of the 15-minute exemption provision, amended APC–3. Subsequent application of the regulation by state and federal authorities, and the fact that neither the regulators nor those subject to the provisions of APC–3 have seen fit to revise it or to secure a judicial determination of its validity in the period of over five years since its stated approval, lend credence to such a conclusion. APC–3 is thus a valid and enforceable part of Indiana's Implementation Plan. The reluctance of the Court in *Bethlehem Steel Corporation* v. *United States Environmental Protection Agency*, 638 F.2d 994 (7th Cir. 1980) to decide this question on the record before it under entirely dissimilar factual circumstances does not influence this result. Accordingly, asserted violations of APC–3 constituted a valid and viable element of the applications underlying the warrants challenged herein.

As to PSI's contention that the warrants violated Fourth Amendment principles by authorizing searches not reasonably limited in scope to the areas pertinent to the violations asserted in the warrant applications, the Court has concluded that the searches conducted exceeded neither statutory nor constitutional limitations.

[7] The evidence revealed that Mr. Schulz toured several areas of each generating station in the course of his inspection, including coal storage areas, boilers, stacks, ash disposal systems, and control rooms. Schulz testified that inspection of an entire regulated facility was standard operating procedure for the EPA. The warrants expressly provided for entry into such areas:

> For the purpose of conducting an entry to, upon or through the above described premises during regular working hours or at other reasonable times, and to inspect, test, investigate, sample and photograph, in a reasonable manner and to a reasonable extent, the work place or environment where work is performed by employees of the employer and all pertinent conditions, structures, machines, apparatus, devices, equipment, materials, files, papers, processes, controls, facilities and other things therein, specifically including though not limited to the following: The coal unloading area, coal stockpile, boilers, turbines, control instrumentation, pollution control equipment, stacks, and ash disposal systems.

Contrary to the assertions of the plaintiff, who would limit EPA inspectors to areas housing monitoring equipment in cases such as this, such language does not authorize a "fishing expedition." Rather, reasonably interpreted, the warrants are carefully drawn documents limiting the searches to areas which, according to the testimony of Mr. Schulz, have direct bearing and effect on opacity and particulate levels. The warrants permit entry to search for violations of regulations promulgated pursuant to the Clean Air Act, and although the applications additionally set forth specifically suspected violations of APC–3 or APC–4R, authorize nothing beyond the parameters of Section 114, which

allows entry upon any premises subject to the Act for the purpose of seeing that its provisions are carried out. 42 U.S.C. § 7414(a)(2).

The constitutional constraints imposed upon warrants of the type before the Court were set out in *Michigan* v. *Tyler*, 435 U.S. 449, 501, 98 S.Ct. 1942, 1945, 56 L.Ed.2d 135 (1978), where the Court held that "[t]he magistrate's duty is to assure that the proposed search will be reasonable, a determination that requires inquiry into the need for intrusion on one hand, and the threat of disruption of the occupant on the other." The standard involves balancing the need to search against privacy interests, *Camara, supra*, 387 U.S. at 537, 87 S.Ct. at 1734, and in the context of administrative searches traditionally involves consideration of the language of an agency's enabling statute and the facts of a particular case. The Seventh Circuit enunciated the first of these considerations in *Marshall* v. *Chromalloy American Corporation*, 589 F.2d 1335 (1979) when it held that the scope of an "inspection warrant must be as broad as the subject matter regulated by the statute and restricted only by the limitations imposed by Congress and the reasonableness requirement of the Fourth Amendment." *Id.* at 1343, *citing Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 66 S.Ct. 494, 90 L.Ed. 614 (1946).

With these guidelines in mind, the Court has concluded that the warrants for inspection of PSI's Gibson and Wabash River Stations were not overly broad or unreasonably disruptive. The inspection tours necessitated the accompanying of EPA employees by from one to three PSI employees for a period of several hours. The inspections necessitated no plant shutdowns or loss of generating capacity and, unlike the intrusion authorized and held unconstitutionally overbroad in *Marshall* v. *Pool Offshore Co.*, 467 F.Supp. 978 (W.D.La.1979), involved the plant and facilities of only one employer, PSI. Under these circumstances, and in the context of the broad statutory authority set forth in 42 U.S.C. § 7414(a)(2), the challenged searches must be upheld as constitutional.

[8] The remaining issues raised in the complaint may be disposed of in summary fashion. PSI contends that provisions of the Clean Air Act do not authorize EPA investigators to photograph facilities being inspected. No evidence was presented to lend credence to PSI's expressed concern that the photographs taken by Mr. Schulz would be used to pinpoint and cite PSI for violations in addition to those for which the inspection was originally conducted. Mr. Schulz testified that the photographs were intended merely as an aid to his recollection of the layout and organization of the Gibson and Wabash River Generating Stations insofar as equipment bearing on opacity and particulate requirements was concerned. PSI does not contend that any of the items photographed were secret or classified in nature. Indeed, Section 114(c), 42 U.S.C. § 7414(c), provides for nondisclosure of confidential materials or information gained during administrative inspections upon a claim by a regulated enterprise and a determination by the Administrator that nondisclosure is appropriate. Under the facts of the present case, the photographs taken by Mr. Schulz were not improper.

[9] Finally, the Court need not make a determination in regard to PSI's claim that the inspection warrants issued by the magistrate were improperly utilized by the EPA to secure documents and materials not stored on the premises of the Gibson or Wabash River Stations. The documents requested by Mr. Schulz at the time of the inspections were ones which were obtainable under the Clean Air Act, and which the EPA reasonably believed would be on the premises. More important, however, is the fact that upon request by Mr. Schulz, the manager of the Gibson Station agreed to see that the additional materials were delivered to the EPA. Additionally, the testimony of Mr. Schulz indicated that information in the nature of that submitted to the EPA following his request that it be produced is commonly forwarded to the EPA upon receipt of a letter demanding such material under the provisions of Section 114 of the Clean Air Act. Thus, although the itemized list of requested documents was printed on the back of the search warrants by Mr. Schulz, the agreement

by the station management and the fact that the materials are obtainable under Section 114 in the normal course of EPA operations, persuades the Court that under the facts of this case no abuse of the privileges conferred by the warrants occurred in connection with the requested documents. Accordingly, their return to PSI will not be ordered.

III. CONCLUSIONS

[10] Having reviewed the pleadings, transcript, and evidence presented in this cause, the Court has concluded that defendant EPA did not exceed statutory or constitutional boundaries in connection with the challenged warrants and inspections of PSI's Gibson and Wabash River Generating Stations. The fact that the notice of violation ultimately received by PSI apparently arose out of the continuous monitoring data and other information in the possession of the EPA prior to the inspections, and that no violations of Clean Air provisions were discovered during the challenged inspection tours, is irrelevant to the conclusions reached by the Court with regard to the validity of the warrants themselves. The Court is cognizant of the potential for abuse of the broad statutory authority conferred upon the many regulatory bodies with which modern business and public institutions must contend. Administrative bodies would be wrong to interpret this decision as conferring upon them carte blanche authority to harass or meddle without restriction in the affairs of enterprises subject to their scrutiny. The Court hereby merely holds that under the particular facts and circumstances presented by this case, the boundaries established for the EPA by Congress and the Constitution were not overstepped. Accordingly, plaintiff's request for injunctive and declaratory relief will be denied, and judgment will be entered in favor of the defendant.

The foregoing shall constitute the findings and conclusions of the Court in connection with this matter.

Opinion by Judge Campbell

JUDGMENT—ORAL ARGUMENT

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604
June 25, 1982.

Before

Hon. **WILLIAM J. BAUER**, Circuit Judge
Hon. **HARLINGTON WOOD, JR.**, Circuit Judge
Hon. **WILLIAM J. CAMPBELL**, Senior District Judge*

PUBLIC SERVICE COMPANY OF INDIANA, INC.,
Plaintiff-Appellant,

vs.

No. 81-1241
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and DOUGLAS M. COSTLE,
Individually and as Administrator of the Environmental Protection Agency,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. IP 80-C-332
Judge James E. Noland.

This cause was heard on the record from the United States District Court for the Southern District of Indiana, Indianapolis Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

*Honorable William J. Campbell, Senior District Judge of the Northern District of Illinois, is sitting by designation.

Clean Air Act, 42 U.S.C. §§ 7401-7626 (Supp. iv 1980) (selected provisions)

§ 7401. Congressional findings and declaration of purpose

(a) The Congress finds—

(1) that the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas, which generally cross the boundary lines of local jurisdictions and often extend into two or more States;

(2) that the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to the public health and welfare, including injury to agricultural crops and livestock, damage to and the deterioration of property, and hazards to air and ground transportation;

(3) that the prevention and control of air pollution at is source is the primary responsibility of States and local governments; and

(4) that Federal financial assistance and leadership is essential for the development of cooperative Federal, State, regional, and local programs to prevent and control air pollution.

(b) The purposes of this subchapter are—

(1) to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population;

(2) to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution;

(3) to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs; and

(4) to encourage and assist the development and operation of regional air pollution control programs.

§ 7410. State implementation plans for national primary and secondary ambient air quality standards

(a) Adoption of plan by State; submission to Administrator; content of plan; revision; new sources; indi-

rect source review program; supplemental or intermittent control systems

(1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within nine months after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 7409 of this title for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within nine months after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.

(2) The Administrator shall, within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan, or any portion thereof. The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that—

(A) except as may be provided in subparagraph (I)(i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practicable but (subject to subsection (e) of this section) in no case later than three years from the date of approval of such plan (or any revision thereof to take account of a revised primary standard); and (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained;

(B) it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other

measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, transportation controls, air quality maintenance plans, and preconstruction review of direct sources of air pollution as provided in subparagraph (D);

(C) it includes provision for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile, and analyze data on ambient air quality and, (ii) upon request, make such data available to the Administrator;

(D) it includes a program to provide for the enforcement of emission limitations and regulation of the modification, construction, and operation of any stationary source, including a permit program as required in parts C and D and a permit or equivalent program for any major emitting facility, within such region as necessary to assure (i) that national ambient air quality standards are achieved and maintained, and (ii) a procedure, meeting the requirements of paragraph (4), for review (prior to construction or modification) of the location of new sources to which a standard of performance will apply;

(E) it contains adequate provisions (i) prohibiting any stationary source within the State from emitting any air pollutant in amounts which will (I) prevent attainment or maintenance by any other State of any such national primary or secondary ambient air quality standard, or (II) interfere with measures required to be included in the applicable implementation plan for any other State under part C to prevent significant deterioration of air quality or to protect visibility, and (ii) insuring compliance with the requirements of section 7426 of this title, relating to interstate pollution abatement;

(F) it provides (i) necessary assurances that the State will have adequate personnel, funding, and authority to carry out such implementation plan, (ii) requirements for installation of equipment by owners or operators of stationary sources to monitor emissions from such sources, (iii) for periodic reports on the nature and amounts of such

emissions; (iv) that such reports shall be correlated by the State agency with any emission limitations or standards established pursuant to this chapter, which reports shall be available at reasonable times for public inspection; (v) for authority comparable to that in section 7603 of this title, and adequate contingency plans to implement such authority; and (vi) requirements that the State comply with the requirements respecting State boards under section 7428 of this title;

(G) it provides, to the extent necessary and practicable, for periodic inspection and testing of motor vehicles to enforce compliance with applicable emission standards;

(H) it provides for revision, after public hearings, of such plan (i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of achieving such primary or secondary standards; or (ii) except as provided in paragraph (3)(C), whenever the Administrator finds on the basis of information available to him that the plan is substantially inadequate to achieve the national ambient air quality primary or secondary standard which it implements or to otherwise comply with any additional requirements established under the Clean Air Act Amendments of 1977;

(I) it provides that after June 30, 1979, no major stationary source shall be constructed or modified in any nonattainment area (as defined in section 7501(2) of this title) to which such plan applies, if the emissions from such facility will cause or contribute to concentrations of any pollutant for which a national ambient air quality standard is exceeded in such area, unless, as of the time of application for a permit for such construction or modification, such plan meets the requirements of part (D) (relating to nonattainment areas);

(J) it meets the requirements of section 7421 of this title (relating to consultation), section 7427 of this title (relating to public notification), part C (relating to prevention of significant deterioration of air quality and visibility protection); and

(K) it requires the owner or operator of each major stationary source to pay to the permitting authority as a condition of any permit required under this chapter a fee sufficient to cover—

(i) the reasonable costs of reviewing and acting upon any application for such a permit, and

(ii) if the owner or operator receives a permit for such source, whether before or after August 7, 1977, the reasonable costs (incurred after such date) of implementing and enforcing the terms and conditions of any such permit (not including any court costs or other costs associated with any enforcement action).

(3)(A) The Administrator shall approve any revision of an implementation plan applicable to an air quality control region if he determines that it meets the requirements of paragraph (2) and has been adopted by the State after reasonable notice and public hearings.

(B) As soon as practicable, the Administrator shall, consistent with the purposes of this chapter and the Energy Supply and Environmental Coordination Act of 1974 [15 U.S.C. 791 et seq.], review each State's applicable implementation plans and report to the State on whether such plans can be revised in relation to fuel burning stationary sources (or persons supplying fuel to such sources) without interfering with the attainment and maintenance of any national ambient air quality standard within the period permitted in this section. If the Administrator determines that any such plan can be revised, he shall notify the State that a plan revision may be submitted by the State. Any plan revision which is submitted by the State shall, after public notice and opportunity for public hearing, be approved by the Administrator if the revision relates only to fuel burning stationary sources (or persons supplying fuel to such sources), and the plan as revised complies with paragraph (2) of this subsection. The Administrator shall approve or disapprove any revision no later than three months after its submission.

(C) Neither the State, in the case of a plan (or portion thereof) approved under this subsection, nor the Administrator in the case of a plan (or portion thereof) promulgated under subsection (c) of this section, shall be required to revise an applicable implementation plan because one or more exemptions under section 7418 of this title (relating to Federal facilities), enforcement orders under section 7413(d) of this title, suspensions under subsections (f) or (g) of this section (relating to temporary energy or economic authority) or orders under section 7419 of this title (relating to primary nonferrous smelters) have been granted, if such plan would have met the requirements of this section if no such exemptions, orders, extension, or variances had been granted.

(D) Any applicable implementation plan for which an attainment date later than December 31, 1982, is provided pursuant to section 7502(a)(2) of this title shall be revised by July 1, 1979, to include the comprehensive measures and requirements referred to in subsection (c)(5)(B) of this section.

(4) The procedure referred to in paragraph (2)(D) for review, prior to construction or modification, of the location of new sources shall (A) provide for adequate authority to prevent the construction or modification of any new source to which a standard of performance under section 7411 of this title will apply at any location which the State determines will prevent the attainment or maintenance within any air quality control region (or portion thereof) within such State of a national ambient air quality primary or secondary standard, and (B) require that prior to commencing construction or modification of any such source, the owner or operator thereof shall submit to such State such information as may be necessary to permit the State to make a determination under clause (A).

(5)(A)(i) Any State may include in a State implementation plan, but the Administrator may not require as a condition of approval of such plan under this section, any indirect source review program. The Administrator may approve and

enforce, as part of an applicable implementation plan, an indirect source review program which the State chooses to adopt and submit as part of its plan.

(ii) Except as provided in subparagraph (B), no plan promulgated by the Administrator shall include any indirect source review program for any air quality control region, or portion thereof.

(iii) Any State may revise an applicable implementation plan approved under this subsection to suspend or revoke any such program included in such plan, provided that such plan meets the requirements of this section.

(B) The Administrator shall have the authority to promulgate, implement and enforce regulations under subsection (c) of this section respecting indirect source review programs which apply only to federally assisted highways, airports, and other major federally assisted indirect sources and federally owned or operated indirect sources.

(C) For purposes of this paragraph, the term "indirect source means a facility, building, structure, installation, real property, road or highway which attracts, or may attract, mobile sources of pollution. Such term includes parking lots, parking garages, and other facilities subject to any measure for management of parking supply (within the meaning of subsection (d)(2)(D)(ii) of this section), including regulation of existing off-street parking but such term does not include new or existing on-street parking. Direct emissions sources or facilities at, within, or associated with, any indirect source shall not be deemed indirect sources for the purpose of this paragraph.

(D) For purposes of this paragraph the term "indirect source review program" means the facility-by-facility review of indirect sources of air pollution, including such measures as are necessary to assure, or assist in assuring, that a new or modified indirect source will not attract mobile sources of air pollution, the emissions from which would cause or contribute to air pollution concentrations—

(i) exceeding any national primary ambient air quality standard for a mobile source-related air pollutant after the primary standard attainment date, or

(ii) preventing maintenance of any such standard after such date.

(E) for purposes of this paragraph and paragraph (2)(B), the term "transportation control measure" does not include any measure which is an "Indirect source review program".

(6) No State plan shall be treated as meeting the requirements of this section unless such plan provides that in the case of any source which uses a supplemental, or intermittent control system for purposes of meeting the requirements of an order under section 7413(d) of this title or section 7419 of this title (relating to primary nonferrous smelter orders), the owner or operator of such source may not temporarily reduce the pay of any employee by reason of the use of such supplemental or intermittent or other dispersion dependent control system.

(b) Extension of period for submission of plans

The administrator may, wherever he determines necessary, extend the period for submission of any plan or portion thereof which implements a national secondary ambient air quality standard for a period not to exeed 18 months from the date otherwise required for submission of such plan.

(c) Preparation and publication by Administrator proposed regulations setting forth implementation plan; transportation regulations study and report; parking surcharge; suspension authority; plan implementation

(1) The Administrator shall, after consideration of any State hearing record, promptly prepare and publish proposed regulations setting forth an implementation plan or portion thereof, for a State if—

(A) the State fails to submit an implementation plan which meets the requirements of this section.

(B) the plan, or any portion thereof, submitted for such State is determined by the Administrator not be in accordance with the requirements of this section, or

(C) the State fails, within 60 days after notification by the Administrator or such longer period as he may prescribe, to revise an implementation plan as required pursuant to a provision of its plan referred to in subsection (a)(2)(H) of this section.

If such State held no public hearing associated with respect to such plan (or revision thereof), the Administrator shall provide opportunity for such hearing within such State on any proposed regulation. The Administrator shall, within six months after the date required for submission of such plan (or revision thereof), promulgate any such regulations unless, prior to such promulgation, such State has adopted and submitted a plan (or revision) which the Administrator determines to be in accordance with the requirements of this section. Notwithstanding the preceding sentence, any portion of a plan relating to any measure described in the first sentence of section 7421 of this title (relating to consultation) or the consultation process required under such section 7421 of this title shall not be required to be promulgated before the date eight months after such date required for submission.

(2)(A) The Administrator shall conduct a study and shall submit a report to the Committee on Interstate and Foreign Commerce of the United States House of Representatives and the Committee on Environment and Public Works of the United States Senate not later than three months after June 22, 1974, on the necessity of parking surcharge, management of parking supply, and preferential bus/carpool lane regulations as part of the applicable implementation plans required under this section to achieve and maintain national primary ambient air quality standards. The study shall include an assessment of the economic impact of such regulations, consideration of alternative means of reducing total vehicle miles traveled, and an assessment of the impact of such regulations on other Federal and State programs dealing with energy or transportation. In the course of such study, the Administrator shall consult with other Federal officials including, but not limited to, the Secretary of Transportation, the Federal Energy Administrator, and the Chairman of the Council on Environmental Quality.

(B) No parking surcharge regulation may be required by the Administrator under paragraph (1) of this subsection as a part of an applicable implementation plan. All parking surcharge regulations previously required by the Administrator shall be void upon June 22, 1974. This subparagraph shall not prevent the Administrator from approving parking surcharges if they are adopted and submitted by a State as a part of an applicable implementation plan. The Administrator may not condition approval of any implementation plan submitted by a State on such plan's including a parking surcharge regulation.

(C) The Administrator is authorized to suspend until January 1, 1975, the effective date or applicability of any regulations for the management of parking supply or any requirement that such regulations be a part of an applicable implementation plan approved or promulgated under this section. The exercise of the authority under this subparagraph shall not prevent the Administrator from approving such regulations if they are adopted and submitted by a State as part of an applicable implementation plan. If the Administrator exercises the authority under this subparagraph, regulations requiring a review or analysis of the impact of proposed parking facilities before construction which take effect on or after January 1, 1975, shall not apply to parking facilities on which construction has been initiated before January 1, 1975.

(D) For purposes of this paragraph—

(i) The term "parking surcharge regulation" means a regulation imposing or requiring the imposition of any tax, surcharge, fee, or other charge on parking spaces, or any other area used for the temporary storage of motor vehicles.

(ii) The term "management of parking supply" shall include any requirement providing that any new facility containing a given number of parking spaces shall receive a permit or other prior approval, issuance of which is to be conditioned on air quality considerations.

(iii) The term "preferential bus/carpool lane" shall include any requirement for the setting aside of one or more lanes of a street or highway on a permanent or temporary basis for the exclusive use of buses or carpools, or both.

(E) No standard, plan, or requirement, relating to management of parking supply or preferential bus/carpool lanes shall be promulgated after June 22, 1974, by the Administrator pursuant to this section, unless such promulgation has been subjected to at least one public hearing which has been held in the area affected and for which reasonable notice has been given in such area. If substantial changes are made following public hearings, one or more additional hearings shall be held in such area after such notice.

(3) Upon application of the chief executive officer of any general purpose unit of local government, if the Administrator determines that such unit has adequate authority under State or local law, the Administrator may delegate to such unit the authority to implement and enforce within the jurisdiction of such unit any part of a plan promulgated under this subsection. Nothing in this paragraph shall prevent the Administrator from implementing or enforcing any applicable provision of a plan promulgated under this subsection.

(4) In the case of any applicable implementation plan containing measures requiring—

(A) retrofits on other than commercially owned in-use vehicles,

(B) gas rationing which the Administrator finds would have seriously disruptive and widespread economic or social effects, or

(C) the reduction of the supply of on-street parking spaces,

the Governor of the State may, after notice and opportunity for public hearing, temporarily suspend such measures notwithstanding the requirements of this section until January 1, 1979, or the date on which a plan revision under subsection (a)(2)(I) of this section is submitted, whichever is earlier. No such suspension shall be granted unless the State

agrees to prepare, adopt, and submit such plan revision as determined by the Administrator.

(5)(A) Any measure in an applicable implementation plan which requires a toll or other charge for the use of a bridge located entirely within one city shall be eliminated from such plan by the Administrator upon application by the Governor of the State, which application shall include a certification by the Governor that he will revise such plan in accordance with subparagraph (B).

(B) In the case of any applicable implementation plan with respect to which a measure has been eliminated under subparagraph (A), such plan shall, not later than one year after August 7, 1977, be revised to include comprehensive measures (including the written evidence required by part D), to:

(i) establish, expand, or improve public transportation measures to meet basic transportation needs, as expeditiously as is practicable; and

(ii) implement transportation control measures necessary to attain and maintain national ambient air quality standards,

and such revised plan shall, for the purpose of implementing such comprehensive public transportation measures, include requirements to use (insofar as is necessary) Federal grants, State or local funds, or any combination of such grants and funds as may be consistent with the terms of the legislation providing such grants and funds. Such measures shall, as a substitute for the tolls or charges eliminated under subparagraph (A), provide for emissions reductions equivalent to the reductions which may reasonably be expected to be achieved through the use of the tolls or charges eliminated.

(C) Any revision of an implementation plan for purposes of meeting the requirements of subparagraph (B) shall be submitted in coordination with any plan revision required under part D.

(d) Applicable implementation plan

For purposes of this chapter, an applicable implementation plan is the implementation, or most recent revision thereof, which has been approved under subsection (a) of this section or promulgated under subsection (c) of this section and which implements the requirements of this section.

(e) Extension of time period for attainment of national primary ambient air quality standard in implementation plan; procedure; approval of extension by Administrator

(1) Upon application of a Governor of a State at the time of submission of any plan implementing a national ambient air quality primary standard, the Administrator may (subject to paragraph (2)) extend the three-year period referred to in subsection (a)(2)(A)(i) of this section for not more than two years for an air quality control region if after review of such plan the Administrator determines that—

(A) one or more emission sources (or classes of moving sources) are unable to comply with the requirements of such plan which implement such primary standard because the necessary technology or other alternatives are not available or will not be available soon enough to permit compliance within such three-year period, and

(B) the State has considered and applied as a part of its plan reasonably available alternative means of attaining such primary standard and has justifiably concluded that attainment of such primary standard within the three years cannot be achieved.

(2) The Administrator may grant an extension under paragraph (1) only if he determines that the State plan provides for—

(A) application of the requirements of the plan which implement such primary standard to all emission sources in such region other than the sources (or classes) described in paragraph (1)(A) within the three-year period, and

(B) such interim measures of control of the sources (or classes) described in paragraph (1)(A) as the Administrator determines to be reasonable under the circumstances.

(f) National or regional energy emergencies; determination by President

(1) Upon application by the owner or operator of a fuel burning stationary source, and after notice and opportunity for public hearing, the Governor of the State in which such source is located may petition the President to determine that a national or regional energy emergency exists of such severity that—

(A) a temporary suspension of any part of the applicable implementation plan may be necessary, and

(B) other means of responding to energy emergency may be inadequate.

Such determination shall not be delegable by the President to any other person. If the President determines that a national or regional energy emergency of such severity exists, a temporary emergency suspension of any part of an applicable implementation plan adopted by the State may be issued by the Governor of any State covered by the President's determination under the condition specified in paragraph (2) and may take effect immediately.

(2) A temporary emergency suspension under this subsection shall be issued to a source only if the Governor of such State finds that—

(A) there exists in the vicinity of such source a temporary energy emergency involving high levels of unemployment or loss of necessary energy supplies for residential dwellings; and

(B) such unemployment or loss can be totally or partially alleviated by such emergency suspension.

Not more than one such suspension may be issued for any source on the basis of the same set of circumstances or on the basis of the same emergency.

(3) A temporary emergency suspension issued by a Governor under this subsection shall remain in effect for a maximum of four months of such lesser period as may be specified in a disapproval order of the Administrator, if any.

The Administrator may disapprove such suspension if he determines that it does not meet the requirements of paragraph (2).

(4) This subsection shall not apply in the case of a plan provision or requirement promulgated by the Administrator under subsection (c) of this section, but in any such case the President may grant a temporary emergency suspension for a four month period of any such provision or requirement if he makes the determinations and findings specified in paragraphs (1) and (2).

(5) The Governor may include in any temporary emergency suspension issued under this subsection a provision delaying for a period identical to the period of such suspension any compliance schedule (or increment of progress) to which such source is subject under section 1857c-10 of this title, as in effect before August 7, 1977, or section 7413(d) of this title, upon a finding that such source is unable to comply with such schedule (or increment) solely because of the conditions on the basis of which a suspension was issued under this subsection.

(g) Governor's authority to issue temporary emergency suspensions

(1) In the case of any State which has adopted and submitted to the Administrator a proposed plan revision which the State determines—

(A) meets the requirements of this section, and

(B) is necessary (i) to prevent the closing for one year or more of any source of air pollution, and (ii) to prevent substantial increases in unemployment which would result from such closing, and

which the Administrator has not approved or disapproved under this section within the required four month period, the Governor may issue a temporary emergency suspension of the part of the applicable implementation plan for such State which is proposed to be revised with respect to such source. The determination under subparagraph (B) may not be made with respect to a source which would close without regard to whether or not the proposed plan revision is approved.

(2) A temporary emergency suspension issued by a Governor under this subsection shall remain in effect for a maximum of four months or such lesser period as may be specified in a disapproval order of the Administrator. The Administrator may disapprove such suspension if he determines that it does not meet the requirements of this subsection.

(3) The Governor may include in any temporary emergency suspension issued under this subsection a provision delaying for a period identical to the period of such suspension any compliance schedule (or increment of progress) to which such source is subject under section 1857c-10 of this title as in effect before August 7, 1977, or under section 7413(d) of this title upon a finding that such source is unable to comply with such schedule (or increment) solely because of the conditions on the basis of which a suspension was issued under this subsection.

(h) Annual publication of comprehensive document for each State setting forth requirements of applicable implementation plan

(1) Not later than one year after August 7, 1977, and annually thereafter, the Administrator shall assemble and publish a comprehensive document for each State setting forth all requirements of the applicable implementation plan for such State and shall publish notice in the Federal Register of the availability of such documents. Each such document shall be revised as frequently as practicable but not less often than annually.

(2) The Administrator may promulgate such regulations as may be reasonably necessary to carry out the purpose of this subsection.

(i) Modification of requirements prohibited

Except for a primary nonferrous smelter order under section 7419 of this title, a suspension under subsection (f) or (g) of this section (relating to emergency suspensions), an exemption under section 7418 of this title (relating to certain Federal facilities), an order under section 7413(d) of this title

(relating to compliance orders), a plan promulgation under subsection (c) of this section, or a plan revision under subsection (a)(3) of this section; no order, suspension, plan revision, or other action modifying any requirement of an applicable implementation plan may be taken with respect to any stationary source by the State or by the Administrator.

(j) Technological systems of continuous emission reduction on new or modified stationary sources; compliance with performance standards

As a condition for issuance of any permit required under this subchapter, the owner or operator of each new or modified stationary source which is required to obtain such a permit must show to the satisfaction of the permitting authority that the technological system of continuous emission reduction which is to be used at such source will enable it to comply with the standards of performance which are to apply to such source and that the construction or modification and operation of such source will be in compliance with all other requirements of this chapter.

(July 14, 1955, ch. 360, title I, § 110, as added Dec. 31, 1970, Pub. L. 91-604, § 4(a), 84 Stat. 1680, and amended June 22, 1974, Pub. L. 93-319, § 4, 88 Stat. 256; S. Res. 4, Feb. 4, 1977; Aug. 7, 1977, Pub. L. 95-95, title I, §§ 107, 108, 91 Stat. 691, 693; Nov. 16, 1977, Pub. L. 95-190, § 14(a)(1)-(6), 91 Stat. 1399.)

§ 7413. Federal enforcement procedures

(a) Finding of violation; notice; compliance order; civil action; State failure to enforce plan; construction or modification of major stationary sources

(1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any requirement of an applicable implementation plan, the Administrator shall notify the person in violation of the plan and the State in which the plan applies of such finding. If such violation extends beyond the 30th day after the date of the Administrator's notification, the Administrator may issue an order requiring such person to comply with the requirements

of such plan or he may bring a civil action in accordance with subsection (b) of this section.

(2) Whenever, on the basis of information available to him, the Administrator finds that violations of an applicable implementation plan are so widespread that such violations appear to result from a failure of the State in which the plan applies to enforce the plan effectively, he shall so notify the State. If the Administrator finds such failure extends beyond the 30th day after such notice, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such plan (hereafter referred to in this section as "period of federally assumed enforcement"), the Administrator may enforce any requirement of such plan with respect to any person—

(A) by issuing an order to comply with such requirement, or

(B) by bringing a civil action under subsection (b) of this section.

(3) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of section 7411(e) of this title (relating to new source performance standards), section 7412(c) of this title (relating to standards for hazardous emissions), or section 1857c-10(g) of this title (relating to energy-related authorities) is in violation of any requirement of section 7414 of this title (relating to inspections, etc.), he may issue an order requiring such person to comply with such section or requirement, or he may bring a civil action in accordance with subsection (b) of this section.

(4) An order issued under this subsection (other than an order relating to a violation of section 7412 of this title) shall not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator concerning the alleged violation. A copy of any order issued under this subsection shall be sent to the State air pollution control agency or any State in which the violation occurs. Any order

issued under this subsection shall state with reasonable specificity the nature of the violation, specify a time for compliance which the Administrator determines is reasonable, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements. In any case in which an order under this subsection (or notice to a violator under paragraph (1) is issued to a corporation, a copy of such order (or notice) shall be issued to appropriate corporate officers.

(5) Whenever, on the basis of information available to him, the Administrator finds that a State is not acting in compliance with any requirement of the regulation referred to in section 129(a)(1) of the Clean Air Act Amendments of 1977 (relating to certain interpretative regulations) or any plan provisions required under section 7410(a)(2)(I) of this title and part D, he may issue an order prohibiting the construction or modification of any major stationary source in any area to which such provisions apply or he may bring a civil action under subsection (b)(5) of this section.

(b) Violations by owners or operators of major stationary sources

The Administrator shall, in the case of any person which is the owner or operator of a major stationary source, and may, in the case of any other person, commence a civil action for a permanent or temporary injunction, or to assess and recover a civil penalty of not more than $25,000 per day of violation, or both, whenever such person—

(1) violates or fails or refuses to comply with any order issued under subsection (a) of this section; or

(2) violates any requirement of an applicable implementation plan (A) during any period of Federally assumed enforcement, or (B) more than 30 days after having been notified by the Administrator under subsection (a)(1) of this section of a finding that such person is violating such requirement; or

(3) violates section 7411(e), section 7412(c), section 1857c-10(g) of this title (as in effect before August 7, 1977),

subsection (d)(5) of this section (relating to coal conversion), section 7624 of this title (relating to cost of certain vapor recovery), section 7419 of this title (relating to smelter orders), or any regulation under part B (relating to ozone); or

(4) fails or refuses to comply with any requirement of section 7414 of this title or subsection (d) of this section; or

(5) attempts to construct or modify a major stationary source in any area with respect to which a finding under subsection (a)(5) of this section has been made.

The Administrator may commence a civil action for recovery of any noncompliance penalty under section 7420 of this title or for recovery of any nonpayment penalty for which any person is liable under section 7420 of this title or for both. Any action under this subsection may be brought in the district court of the United States for the district in which the violation occurred or in which the defendant resides or has his principal place of business, and such court shall have jurisdiction to restrain such violation, to require compliance, to assess such civil penalty and to collect any noncompliance penalty (and nonpayment penalty) owned under section 7420 of this title. In determining the amount of any civil penalty to be assessed under this subsection, the court shall take into consideration (in addition to other factors) the size of the business, the economic impact of the penalty on the business, and the seriousness of the violation. Notice of the commencement of such action shall be given to the appropriate State air pollution control agency. In the case of any action brought by the Administrator under this subsection, the court may award costs of litigation (including reasonable attorney and expert witness fees) to the party or parties against whom such action was brought in any case where the court finds that such action was unreasonable.

(c) Penalties

(1) Any person who knowingly—

(A) violates any requirement of an applicable implementation plan (i) during any period of Federally assumed

enforcement, or (ii) more than 30 days after having been notified by the Administrator under subsection (a)(1) of this section that such person is violating such requirement, or

(B) violates or fails or refuses to comply with any order under section 7419 of this title or under subsection (a) or (d) of this section, or

(C) violates section 7411(e), section 7412(c) of this title, or

(D) violates any requirement of section 1857c-10(g) of this title (as in effect before August 7, 1977), subsection (b)(7) or (d)(5) of section 7420 of this title (relating to noncompliance penalties), or any requirement of part B (relating to ozone),

shall be punished by a fine of not more than $25,000 per day of violation, or by imprisonment for not more than one year, or by both. If the conviction is for a violation committed after the first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment for not more than two years, or by both.

(2) Any person who knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this chapter or who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this chapter, shall upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than six months, or by both.

(3) For the purpose of this subsection, the term "person" includes, an addition to the entities referred to in section 7602(e) of this title, any responsible corporate officer.

(d) Final compliance orders

(1) A State (or, after thirty days notice to the State, the Administrator) may issue to any stationary source which is unable to comply with any requirement of an applicable

implementation plan an order which specifies a date for final compliance with such requirement later than the date for attainment of any national ambient air quality standard specified in such plan if—

(A) such order is issued after notice to the public (and, as appropriate, to the Administrator) containing the content of the proposed order and opportunity for public hearing;

(B) the order contains a schedule and timetable for compliance;

(C) the order requires compliance with applicable interim requirements as provided in paragraph (5)(B) (relating to sources converting to coal), and paragraph (6) and (7) (relating to all sources receiving such orders) and requires the emission monitoring and reporting by the source authorized to be required under sections 7410(a)(2)(F) and 7414(a)(1) of this title;

(D) the order provides for final compliance with the requirement of the applicable implementation plan as expeditiously as practicable, but (except, as provided in paragraph (4) or (5)) in no event later than July 1, 1979, or three years after the date for final compliance with such requirement specified in such plan, whichever is later; and

(E) in the case of a major stationary source, the order notifies the source that, unless exempted under section 7420(a)(2)(B) or (C), it will be required to pay a noncompliance penalty effective July 1, 1979, as provided under section 7420 of this title or by such later date as is set forth in the order in accordance with section 7420(b)(3) or (g) of this title in the event such source fails to achieve final compliance by July 1, 1979.

(2) In the case of any major stationary source, no such order issued by the State shall take effect until the Administrator determines that such order has been issued in accordance with the requirements of this chapter. The Administrator shall determine, not later than 90 days after receipt of notice of the issuance of an order under this subsection with

respect to any major stationary source, whether or not any State order under this subsection is in accordance with the requirements of this chapter. In the case of any source other than a major stationary source, such order issued by the State shall cease to be effective upon a determination by the Administrator that it was not issued in accordance with the requirements of this chapter. If the Administrator so objects, he shall simultaneously proceed to issue an enforcement order in accordance with subsection (a) of this section or an order under this subsection. Nothing in this section shall be construed as limiting the authority of a State or political subdivision to adopt and enforce a more stringent emission limitation or more expeditious schedule or timetable for compliance than that contained in an order by the Administrator.

(3) If any source not in compliance with any requirement of an applicable implementation plan gives written notification to the State (or the Administrator) that such source intends to comply by means of replacement of the facility, a complete change in production process, or a termination of operation, the State (or the Administrator) may issue an order under paragraph (1) of this subsection permitting the source to operate until July 1, 1979, without any interim schedule of compliance: *Provided*, That as a condition of the issuance of any such order, the owner or operator of such source shall post a bond or other surety in an amount equal to the cost of actual compliance by such facility and any economic value which may accrue to the owner or operator of such source by reason of the failure to comply. If a source for which the bond or other surety required by this paragraph has been posted fails to replace the facility, change the production process, or terminate the operations as specified in the order by the required date, the owner or operator shall immediately forfeit on the bond or other surety and the State (or the Administrator) shall have no discretion to modify the order under this paragraph or to compromise the bond or other surety.

(4) An order under paragraph (1) of this subsection may be issued to an existing stationary source if—

(A) the source will expeditiously use new means of emission limitation which the Administrator determines is likely to be adequately demonstrated (within the meaning of section 7411(a)(1)) of this title upon expiration of the order,

(B) such new means of emission limitation is not likely to be used by such source unless an order is granted under this subsection.[1]

(C) such new means of emission limitation is determined by the Administrator to have a substantial likelihood of—

(i) achieving greater continuous emission reduction than the means of emission limitation which, but for such order, would be required; or

(ii) achieving an equivalent continuous reduction at lower cost in terms of energy, economic, or nonair quality environmental impact; and

(D) compliance by the source with the requirement of the applicable implementation plan would be impracticable prior to, or during, the installation of such new means.

Such an order shall provide for final compliance with the requirement in the applicable implementation plan as expeditiously as practicable, but in no event later than five years after the date on which the source would otherwise be required to be in full compliance with the requirement.

(5)(A) In the case of a major stationary source which is burning petroleum products or natural gas, or both and which—

(i) is prohibited from doing so under an order pursuant to the provisions of section 792(a) of title 15, or any amendment thereto, or any subsequent enactment which supersedes such provisions, or

(ii) within one year after August 7, 1977, gives notice of intent to convert to coal as its primary energy source

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[1]So in original. Probably the period should be a comma.

because of actual or anticipated curtailment of natural gas supplies under any curtailment plan or schedule approved by the Federal Power Commission (or, in the case of intrastate natural gas supplies, approved by the appropriate State regulatory commission),

and which thereby would no longer be in compliance with any requirement under an applicable implementation plan, an order may be issued by the Administrator under paragraph (1) of this subsection for such source which specifies a date for final compliance with such requirement as expeditiously as practicable, but not later than December 31, 1980. The Administrator may issue an additional order under paragraph (1) of this subsection for such source providing an additional period for such source to come into compliance with the requirement in the applicable implementation plan, which shall be as expeditiously as practicable, but in no event later than five years after the date required for compliance under the preceding sentence.

(B) In issuing an order pursuant to subparagraph (A), the Administrator shall prescribe (and may from time to time modify) emission limitations, requirements respecting pollution characteristics of coal, or other enforceable measures for control of emissions for each source to which such an order applies. Such limitations, requirements, and measures shall be those which the Administrator determines must be complied with by the source in order to assure (throughout the period before the date for final compliance established in the order) that the burning of coal by such source will not result in emissions which cause or contribute to concentrations of any air pollutant in excess of any national primary ambient air quality standard for such pollutant.

(C) The Administrator may, by regulation, establish priorities under which manufacturers of continuous emission reduction systems necessary to carry out this paragraph shall provide such systems to users thereof, if he finds, after consultation with the States, that priorities must be imposed in order to assure that such systems are first provided to sources subject to orders under this paragraph in air quality

control regions in which national primary ambient air quality standards have not been achieved. No regulation under this subparagraph may impair the obligation of any contract entered into before August 7, 1977.

(D) No order issued to a source under this paragraph with respect to an air pollutant shall be effective if the national primary ambient air quality standard with respect to such pollutant is being exceeded at any time in the air quality control region in which such source is located. The preceding sentence shall not apply to a source if, upon submission by any person of evidence satisfactory to the Administrator, the Administrator determines (after notice and public hearing)—

(i) that emissions of such air pollutant from such source will affect only infrequently the air quality concentrations of such pollutant in each portion of the region where such standard is being exceeded at any time;

(ii) that emissions of such air pollutant from such source will have only insignificant effect on the air quality concentrations of such pollutant in each portion of the region where such standard is being exceeded at any time; and

(iii) with reasonable statistical assurance that emissions of such air pollutant from such source will not cause or contribute to air quality concentrations of such pollutant in excess of the national primary ambient air quality standard for such pollutant.

(6) An order issued to a source under this subsection shall set forth compliance schedules containing increments of progress which require compliance with the requirement postponed as expeditiously as practicable.

(7) A source to which an order is issued under paragraph (1), (3), (4), or (5) of this subsection shall use the best practicable system or systems of emission reduction (as determined by the Administrator taking into account the requirement with which the source must ultimately comply) for the period during which such order is in effect and shall comply with such interim requirements as the Administrator

determines are reasonable and practicable. Such interim requirements shall include—

(A) such measures as the Administrator determines are necessary to avoid an imminent and substantial endangerment to health of persons, and

(B) a requirement that the source comply with the requirements of the applicable implementation plan during any such period insofar as such source is able to do so (as determined by the Administrator).

(8) Any order under paragraph (1) of this subsection shall be terminated if the Administrator determines on the record, after notice and hearing, that the inability of the source to comply no longer exists. If the owner or operator of the source to which the order is issued demonstrates that prompt termination of such order would result in undue hardship, the termination shall become effective at the earliest practicable date on which such undue hardship would not result, but in no event later than the date required under this subsection.

(9) If the Administrator determines that a source to which an order is issued under this subsection is in violation of any requirement of this subsection, he shall—

(A) enforce such requirement under subsections (a), (b), or (c) of this section,

(B) (after notice and opportunity for public hearing) revoke such order and enforce compliance with the requirement with respect to which such order was granted,

(C) give notice of noncompliance and commence action under section 7420 of this title, or

(D) take any appropriate combination of such actions.

(10) During the period of the order in effect under this subsection and where the owner or operator is in compliance with the terms of such order, no Federal enforcement action pursuant to this section and no action under section 7604 of this title shall be pursued against such owner or operator based upon noncompliance during the period the order is in effect with the requirement for the source covered by such order.

(11) For the purposes of sections 7410, 7604, and 7607 of this title, any order issued by the State and in effect pursuant to this subsection shall become part of the applicable implementation plan.

(12) Any enforcement order issued under subsection (a) of this section or any consent decree in an enforcement action which is in effect on August 7, 1977, shall remain in effect to the extent that such order or consent decree is (A) not inconsistent with the requirements of this subsection and section 7419 of this title or (B) the administrative orders on consent issued by the Administrator on November 5, 1975 and February 26, 1976 and requiring compliance with sulfur dioxide emission limitations or standards at least as stringent as those promulgated under section 7411 of this title. Any such enforcement order issued under subsection (a) of this section or consent decree which provides for an extension beyond July 1, 1979, except such administrative orders on consent, is void unless modified under this subsection within one year after August 7, 1977, to comply with the requirements of this subsection.

§ 7602. Definitions

When used in this chapter—

(a) The term "Administrator" means the Administrator of the Environmental Protection Agency.

(b) The term "air pollution control agency" means any of the following:

(1) A single State agency designated by the Governor of that State as the official State air pollution control agency for purposes of this chapter;

(2) An agency established by two or more States and having substantial powers or duties pertaining to the prevention and control of air pollution;

(3) A city, county, or other local government health authority, or, in the case of any city, county, or other local government in which there is an agency other than the health authority charged with responsibility for enforcing ordinances or laws relating to the prevention and control of air pollution, such other agency; or

(4) An agency of two or more municipalities located in the same State or in different States and having substantial powers or duties pertaining to the prevention and control of air pollution.

(c) The term "interstate air pollution control agency" means—

(1) an air pollution control agency established by two or more States, or

(2) an air pollution control agency of two or more municipalities located in different States.

(d) The term "State" means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa and includes the Commonwealth of the Northern Mariana Islands.

(e) The term "person" includes an individual, corporation, partnership, association, State, municipality, political subdivision of a State, and any agency, department, or instrumentality of the United States and any officer, agent, or employee thereof.

(f) The term "municipality" means a city, town, borough, county, parish, district, or other public body created by or pursuant to State law.

(g) The term "air pollutant" means any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive (including source material, special nuclear material, and byproduct material) substance or matter which is emitted into or otherwise the ambient air.

(h) All language referring to effects on welfare includes, but is not limited to, effects on soils, water, crops, vegetation, man made materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being.

(i) The term "Federal land manager" means, with respect to any lands in the United States, the Secretary of the department with authority over such lands.

(j) Except as otherwise expressly provided, the terms "major stationary source" and "major emitting facility" mean any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant (including any major emitting facility or source of fugitive emissions of any such pollutant, as determined by rule by the Administrator).

(k) The terms "emission limitation" and "emission standard" mean a requirement established by the State or the Administrator which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction.

(l) The term "standard of performance" means a requirement of continuous emission reduction, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction.

(m) the term "means of emission limitation" means a system of continuous emission reduction (including the use of specific technology or fuels with specified pollution characteristics).

(n) The term "primary standard attainment date" means the date specified in the applicable implementation plan for the attainment of a national primary ambient air quality standard for any air pollutant.

(o) The term "delayed compliance order" means an order issued by the State or by the Administrator to an existing stationary source, postponing the date required under an applicable implementation plan for compliance by such source with any requirement of such plan.

(p) The term "schedule and timetable of compliance" means a schedule of required measures including an enforceable sequence of actions or operations leading to compliance with an emission limitation, other limitation, prohibition, or standard.

§ 7607. Administrative proceedings and judicial review

(a) Administrative subpenas; confidentiality; witnesses

(1)[1] In connection with any determination under section 7410(f) or section 7521(b)(5) of this title, or for purposes of obtaining information under section 7521(b)(4) or 7545(c)(3) of this title, the Administrator may issue subpenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and he may administer oaths. Except for emission data, upon a showing satisfactory to the Administrator by such owner or operator that such papers, books, documents, or information or particular part thereof, if made public, would divulge trade secrets or secret processes of such owner or operator, the Administrator shall consider such record, report, or information or particular portion thereof confidential in accordance with the purposes of section 1905 of title 18, except that such paper, book, document, or information may be disclosed to other officers, employees, or authorized representatives of the United States concerned with carrying out this chapter, to persons carrying out the National Academy of Sciences' study and investigation provided for in section 7521(c) of this title, or when relevant in any proceeding under this chapter. Witnesses summoned shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy or refusal to obey a subpena served upon any person under this subparagraph, the district court of the United States for any district in which such person is found or resides or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the Administrator to appear and produce papers, books, and documents before the Administrator, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

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[1]So in original. Subsec. (a) enacted without a par. (2).

(b) Judicial review

(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title, any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(1) of this title), any determination under section 7521(b)(5) of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or under section 7420 of this title, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title or section 7411(d) of this title, any order under section 7411(j) of this title, under section 7412(c) of this title, under section 7413(d) of this title, under section 7419 of this title, or under section 7420 of this title, or his action under section 1857c–10(c)(2)(A), (B), or (C) of this title (as in effect before August 7, 1977) or under regulations thereunder, or any other final action of the Administrator under this chapter (including any denial or disapproval by the Administrator under subchapter I of this chapter) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely

on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement.

(c) Additional evidence

In any judicial proceeding in which review is sought of a determination under this chapter required to be made on the record after notice and opportunity for hearing, if any party applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Administrator, in such manner and upon such terms and conditions as to[1] the court may deem proper. The Administrator may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original determination, with the return of such additional evidence.

(d) Rulemaking

(1) This subsection applies to—

(A) the promulgation or revision of any national ambient air quality standard under section 7409 of this title,

(B) the promulgation or revision of an implementation plan by the Administrator under section 7410(c) of this title,

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[1]So in original. Subsec. (a) was enacted without a par. (2).

(C) the promulgation or revision of any standard of performance under section 7411 of this title or emission standard under section 7412 of this title,

(D) the promulgation or revision of any regulation pertaining to any fuel or fuel additive under section 7545 of this title,

(E) the promulgation or revision of any aircraft emission standard under section 7571 of this title,

(F) promulgation or revision of regulations pertaining to orders for coal conversion under section 7413(d)(5) of this title (but not including orders granting or denying any such orders),

(G) promulgation or revision of regulations pertaining to primary nonferrous smelter orders under section 7419 of this title (but not including the granting or denying of any such order),

(H) promulgation or revision of regulations under part B of subchapter I of this chapter (relating to stratosphere and ozone protection),

(I) promulgation or revision of regulations under part C of subchapter I of this chapter (relating to prevention of significant deterioration of air quality and protection of visibility),

(J) promulgation or revision of regulations under section 7521 of this title and test procedures for new motor vehicles or engines under section 7525 of this title and the revision of a standard under section 7521(a)(3) of this title,

(K) promulgation or revision of regulations for noncompliance penalties under section 7420 of this title,

(L) promulgation or revision of any regulations promulgated under section 7541 of this title (relating to warranties and compliance by vehicles in actual use),

(M) action of the Administrator under section 7426 of this title (relating to interstate pollution abatement), and

(N) such other actions as the Administrator may determine.

The provisions of section 553 through 557 and section 706 of title 5 shall not, except as expressly provided in this subsection, apply to actions to which this subsection applies. This subsection shall not apply in the case of any rule or circumstance, referred to in subparagraphs (A) or (B) of subsection 553(b) of title 5.

(2) Not later than the date of proposal of any action to which this subsection applies, the Administrator shall establish a rulemaking docket for such action (hereinafter in this subsection referred to as a "rule"). Whenever a rule applies only within a particular State, a second (identical) docket shall be simultaneously established in the appropriate regional office of the Environmental Protection Agency.

(3) In the case of any rule to which this subsection applies, notice of proposed rulemaking shall be published in the Federal Register, as provided under section 553(b) of title 5, shall be accompanied by a statement of its basis and purpose and shall specify the period available for public comment (hereinafter referred to as the "comment period"). The notice of proposed rulemaking shall also state the docket number, the location or locations of the docket, and the times it will be open to public inspection. The statement of basis and purpose shall include a summary of—

(A) the factual data on which the proposed rule is based;

(B) the methodology used in obtaining the data and in analyzing the data; and

(C) the major legal interpretations and policy considerations underlying the proposed rule.

The statement shall also set forth or summarize and provide a reference to any pertinent findings, recommendations, and comments by the Scientific Review Committee established under section 7409(d) of this title and the National Academy of Sciences, and, if the proposal differs in any important respect from any of these recommendations, an explanation of the reasons for such differences. All data, information, and documents referred to in this paragraph on which the proposed rule relies shall be included in the docket on the date of publication of the proposed rule.

(4)(A) The rulemaking docket required under paragraph (2) shall be open for inspection by the public at reasonable times specified in the notice of proposed rulemaking. Any person may copy documents contained in the docket. The Administrator shall provide copying facilities which may be used at the expense of the person seeking copies, but the Administrator may waive or reduce such expenses in such instances as the public interest requires. Any person may request copies by mail if the person pays the expenses, including personnel costs to do the copying.

(B)(i) Promptly upon receipt by the agency, all written comments and documentary information on the proposed rule received from any person for inclusion in the docket during the comment period shall be placed in the docket. The transcript of public hearings, if any, on the proposed rule shall also be included in the docket promptly upon receipt from the person who transcribed such hearings. All documents which become available after the proposed rule has been published and which the Administrator determines are of central relevance to the rulemaking shall be placed in the docket as soon as possible after their availability.

(ii) The drafts of proposed rules submitted by the Administrator to the Office of Management and Budget for any interagency review process prior to proposal of any such rule, all documents accompanying such drafts, and all written comments thereon by other agencies and all written responses to such written comments by the Administrator shall be placed in the docket no later than the date of proposal of the rule. The drafts of the final rule submitted for such review process prior to promulgation and all such written comments thereon, all documents accompanying such drafts, and written responses thereto shall be placed in the docket no later than the date of promulgation.

(5) In promulgating a rule to which this subsection applies (i) the Administrator shall allow any person to submit written comments, data, or documentary information; (ii) the Administrator shall give interested persons an opportunity for the oral presentation of data, views, or arguments, in addition

to an opportunity to make written submissions; (iii) a transcript shall be kept of any oral presentation; and (iv) the Administrator shall keep the record of such proceeding open for thirty days after completion of the proceeding to provide an opportunity for submission of rebuttal and supplementary information.

(6)(A) The promulgated rule shall be accompanied by (i) a statement of basis and purpose like that referred to in paragraph (3) with respect to a proposed rule and (ii) an explanation of the reasons for any major changes in the promulgated rule from the proposed rule.

(B) The promulgated rule shall also be accompanied by a response to each of the significant comments, criticisms, and new data submitted in written or oral presentations during the comment period.

(C) The promulgated rule may not be based (in part or whole) on any information or data which has not been placed in the docket as of the date of such promulgation.

(7)(A) The record for judicial review shall consist exclusively of the material referred to in paragraph (3), clause (i) of paragraph (4)(B), and subparagraphs (A) and (B) of paragraph (6).

(B) Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review. If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed. If the Administrator refuses to convene such a proceeding, such person may seek review of such refusal in the United States court of appeals

for the appropriate circuit (as provided in subsection (b) of this section). Such reconsideration shall not postpone the effectiveness of the rule. The effectiveness of the rule may be stayed during such reconsideration, however, by the Administrator or the court for a period not to exceed three months.

(8) The sole forum for challenging procedural determinations made by the Administrator under this subsection shall be in the United States court of appeals for the appropriate circuit (as provided in subsection (b) of this section) at the time of the substantive review of the rule. No interlocutory appeals shall be permitted with respect to such procedural determinations. In reviewing alleged procedural errors, the court may invalidate the rule only if the errors were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made.

(9) In the case of review of any action of the Administrator to which this subsection applies, the court may reverse any such action found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or

(D) without observance of procedure required by law, if (i) such failure to observe such procedure is arbitrary or capricious, (ii) the requirement of paragraph (7)(B) has been met, and (iii) the condition of the last sentence of paragraph (8) is met.

(10) Each statutory deadline for promulgation of rules to which this subsection applies which requires promulgation less than six months after date of proposal may be extended to not more than six months after date of proposal by the Administrator upon a determination that such extension is

necessary to afford the public, and the agency, adequate opportunity to carry out the purposes of this subsection.

(11) The requirements of this subsection shall take effect with respect to any rule the proposal of which occurs after ninety days after August 7, 1977.

(e) Other methods of judicial review not authorized

Nothing in this chapter shall be construed to authorize judicial review of regulations or orders of the Administrator under this chapter, except as provided in this section.

(f) Costs

In any judicial proceeding under this section, the court may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such award is appropriate.

(g) Stay, injunction, or similar relief in proceedings relating to noncompliance penalties

In any action respecting the promulgation of regulations under section 7420 of this title or the administration or enforcement of section 7420 of this title no court shall grant any stay, injunctive, or similar relief before final judgment by such court in such action.

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42 U.S.C. § 1857h–5 (1976)

§ 1857h–5. Administrative proceedings and judicial review

(a) Subpenas; production of books and papers; trade secrets; failure to comply with subpena; court order; contempt

(1)[1] In connection with any determination under section 1857c–5(f) or section 1857f–1(b)(5) of this title, or for purposes of obtaining information under section 1857f–1(b)(4) or 1857f–6c(c)(3) of this title, the Administrator may issue subpenas for the attendance and testimony of witnesses and

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[1]So in original. Subsec. (a) was enacted without a par. (2).

the production of relevant papers, books, and documents, and he may administer oaths. Except for emission data, upon a showing satisfactory to the Administrator by such owner or operator that such papers, books, documents, or information or particular part thereof, if made public, would divulge trade secrets or secret processes of such owner or operator, the Administrator shall consider such record, report, or information or particular portion thereof confidential in accordance with the purposes of section 1905 of title 18, except that such paper, book, document, or information may be disclosed to other officers, employees, or authorized representatives of the United States concerned with carrying out this chapter, to persons carrying out the National Academy of Sciences' study and investigation provided for in section 1857f–1(c) of this title, or when relevant in any proceeding under this chapter. Witnesses summoned shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy or refusal to obey a subpoena served upon any person under this subparagraph, the district court of the United States for any district in which such person is found or resides or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the Administrator to appear and produce papers, books, and documents before the Administrator, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(b) Petition for review; appropriate court for filing; civil or criminal proceedings for enforcement

(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard under section 1857c–7 of this title, any standard of performance under section 1857c–6 of this title, any standard under section 1857f–1 of this title (other than a standard required to be prescribed under section 1857f–1(b)(1) of this title), any determination under section 1857f–1(b)(5) of this title, any control or

prohibition under section 1857f–6c of this title or any standard under section 1857f–9 of this title may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 1857c–5 of this title or section 1857c–6(d) of this title, or his action under section 1857c–10(c)(2)(A),(B) or (C) of this title or under regulations thereunder, may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition shall be filed within 30 days from the date of such promulgation, approval, or action, or after such date if such petition is based solely on grounds arising after such 30th day.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement.

(c) Introduction of additional evidence; modification of original determination

In any judicial proceeding in which review is sought of a determination under this chapter required to be made on the record after notice and opportunity for hearing, if any party applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Administrator, in such manner and upon such terms and conditions as to the court may deem proper. The Administrator may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original determination, with the return of such additional evidence.

40 C.F.R. § 52.776 (1981)

§ 52.776 Control strategy: Particulate matter.

(a) The requirements of § 51.13 of this chapter are not met since the plan does not provide for attainment and maintenance of the secondary standards for particulate matter in the Metropolitan Indianapolis Intrastate Region.

(b) APC 4–R of Indiana's "Air Pollution Control Regulations" (emission limitation for particulate matter from fuel combustion sources), which is part of the control strategy for the secondary standards for particulate matter, is disapproved for the Metropolitan Indianapolis Intrastate Region since it does not provide the degree of control needed to attain and maintain the secondary standards for particulate matter. APC4–R is approved for attainment and maintenance of the primary standards for particulate matter in the Metropolitan Indianapolis Intrastate Region.

(c) APC–3 of Indiana's Air Pollution Control Regulations (visible emission limitation) is disapproved insofar as the phrase "for more than a cumulative total of 15 minutes in a 24-hour period" will interfere with attainment and maintenance of particulate standards.

[37 FR 15084, July 27, 1972, as amended at 40 FR 50033, Oct. 28, 1975]

1972 APC–3

AIR POLLUTION CONTROL BOARD OF THE STATE OF INDIANA

NEW RULES NUMBERED APC 1, APC 2, APC 3, APC 4, APC 5, APC 6, AND APC 7

Pursuant to due publication of notice and public hearing required by the provisions of the Acts of 1945, Chapter 120, as found in Burns' IND. STAT. ANN. (1961 Repl.), Section 60-1501, et seq., the Air Pollution Control Board of the State of Indiana at its regular meeting held at 1330 West Michigan Street, Indianapolis, Indiana, on July 25, 1968, at which meeting a majority of members was present as provided by the Acts of 1949, Chapter 157, Section 212, as found

in Burns' Indiana Statute, 1949 replacement 35-1213, unanimously adopted the following new rules:

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REGULATION APC 3
Smoke and Other Visible Emissions

The Ringelmann Chart shall be used for grading the light-obscuring power of smoke. No person shall operate any combustion installation so as to produce, cause, suffer or allow smoke to be omitted, the appearance, density or shade of which is darker than No. 2 of the Ringelmann Chart. When cleaning a fire or blowing tubes, smoke which is not darker than a No. 3 Ringelmann Chart may be emitted for a period or periods not exceeding five minutes in any 60-minute period, such emissions shall not be permitted on more than six occasions during any 24-hour period. When building a new fire, smoke not darker than a No. 3 Ringelmann Chart may be emitted not to exceed ten minutes on one occasion per day. The Board, at its discretion, may accept an extension of the time period and number of such time periods per day.

When a breakdown of equipment or a change of fuel results in smoke darker than a No. 2 of the Ringelmann Chart the Board shall be notified immediately.

The opacity of any color equivalent to the Ringelmann Chart may be used as prima-facie evidence in determining process emissions but may be refuted by approved stack emission tests or other evidence acceptable to the Board.

1974 APC–3, 325 IND. ADMIN. CODE 1-3 (1979)

Rule 3. Visible Emissions and Malfunctions

325 IAC 1-3-1 Limitation on emissions
325 IAC 1-3-2 Temporary exceptions from compliance
325 IAC 1-3-3 Evidence of violations; single stacks and multiple stacks
325 IAC 1-3-4 Malfunctions
325 IAC 1-3-5 Federal new source performance standards

325 IAC 1-3-1 Limitation on emissions

Authority: IC 13-1-1-4; IC 13-7-5-1
Affected: IC 13-1-1-1; IC 13-1-1-4

Sec. 1. Limitation. No person shall operate any equipment so as to produce, cause, suffer, or allow smoke or other visible emissions in excess of 40 per-cent opacity (Ringelmann No. 2) for more than a cumulative total of fifteen minutes in a 24-hour period except as allowed in Sec. 2 and Sec. 4 *[325 IAC 1-3-2 and 325 IAC 1-3-4].* Opacity values shall not be considered valid, unless observed and determined by a qualified person. Visible emissions shall exclude uncombined water. *(Air Pollution Control Board; APC 3, Sec 1; filed Oct. 7, 1974, 10:55 am: Rules and Regs. 1975, p. 122)*

Cited in: 325 IAC 1-3-2—325 IAC 1-3-4.

325 IAC 1-3-2 Temporary exceptions from compliance

Authority: IC 13-1-1-4; IC 13-7-5-1
Affected: IC 13-1-1-1; IC 13-1-1-1; IC 13-7-10-3

Sec. 2. Temporary Exceptions from Compliance. (a) Fire Starting. When building a new fire in a boiler, smoke no darker than 60 percent opacity may be emitted for a period not to exceed ten minutes on one occasion in any 24-hour period.

(b) Boilers. When cleaning a fire in a boiler or blowing tubes, smoke which is not darker than 60 percent opacity may be emitted for periods not exceeding five minutes in any 60-minute period. Such emissions shall not be permitted on more than six occasions during any 24-hour period.

(c) Other. That the time and opacity limitations set forth in Sec. 1 *[325 IAC 1-3-1]*, Sec. 2(a) and Sec. 2(b) *[subsections (a) and (b) of this section]* may be exceeded for reasonable brief periods of time by the specific terms of time and opacity limitations set forth in an operation permit required under APC 19 *[325 IAC 1-16].* The exception may be granted if:

(i) The exception is requested, and

(ii) it is shown that no alternative control method is available, and

(iii) it is not possible for the applicant to comply with Sec. 1 *[325 IAC 1-3-1]*, Sec. 2(a) and Sec. 2(b) *[subsections (a) and (b) of this section].*

Further, that said agency is then authorized to issue an operation permit with said permit setting forth, in detail, the specific terms of the time and opacity limitations granted. *(Air Pollution Control Board; APC 3, Sec. 2; filed Oct. 7, 1974, 10:55 am: Rules and Regs. 1975, p. 123)*

Cited in: 325 IAC 1-3-1; 325 IAC 1-3-3; 325 IAC 1-3-4.

325 IAC 1-3-3 Evidence of violations; single stacks and multiple stacks

Authority: IC 13-1-1-4; IC 13-7-5-1
Affected: IC 13-1-1-4; IC 13-7-5-1

Sec. 3. Violation of Other Regulations. (a) Single Stacks. A violation of Sec. 1 *[325 IAC 1-3-1]* of this Regulation shall constitute prima-facie evidence of a violation of any applicable particulate emission control regulation of the Board, but may be refuted by a stack emission test conducted in accordance with the Board's Source Sampling Policy, or other evidence acceptable to the Board. No violation shall have occurred if it can be shown the emissions are exempt under Section 2 *[325 IAC 1-3-2]* of this Regulation or due to a malfunction providing the requirements of Section 4 *[325 IAC 1-3-4]* are adhered to.

(b) Multiple Stacks. For facilities with multiple stacks, each stack must comply separately with the opacity limitations of Sec. 1 *[325 IAC 1-3-1]*, except as allowed in Sec. 2 *[325 IAC 1-3-2]*, even though the multiple stacks, as a group, are in compliance with the limitations of the Board's applicable particulate emission control regulations. *(Air Pollution Control Board; APC 3, Sec. 3; filed Oct. 7, 1974, 10:55 am: Rules and Regs. 1975, p. 123)*

325 IAC 1-3-4 Malfunctions

Authority: IC 13-1-1-4; IC 13-7-5-1
Affected: IC 13-1-1-1; IC 13-1-1-4; IC 13-1-1-7

Sec. 4. Malfunctions. (a) Malfunction. For the purpose of this regulation *[325 IAC 1-3]* shall mean any sudden, unforeseen, or unavoidable failure of air pollution control equipment, or combustion or process equipment to operate in a

normal manner and in compliance with all applicable regulations of the Board.

(b) Reporting. When a malfunction of any combustion or process operation or air pollution control equipment lasts more than one hour, the Technical Secretary shall be notified by telephone, or telegraph, as soon as practicable, but in no event later than four daytime business hours after the beginning of said occurrence. Information of the scope and expected duration of the malfunction shall be provided. A record shall be kept of all malfunctions, including start ups, or other events which result in violations of Sec. 1 and 2 *[325 IAC 1-3-1 and 325 IAC 1-3-2]*, and such record shall be made available to the Board upon request.

(c) Maintenance. Source operators are responsible for operating and maintaining all equipment and processes in compliance with all applicable regulations of the Board. The Board recognizes that malfunctions may occur for many and varied reasons. Curtailment of operations shall be required, except as covered in Sec. 4(d) *[subsection (d) of this section]*, if the source is not in compliance at least 90 percent of the operating time over the most recent 12-month period. Where the record shows repeated malfunctions exceeding 5 percent of the normal operational time attributed to improper maintenance of faulty equipment, the Board may require that the maintenance program be improved or that the defective or faulty equipment be replaced. To eliminate long term malfunction periods resulting from delays in obtaining replacement parts, an adequate stock of replacement parts shall be maintained.

(d) Malfunction Emission Reduction Program. Malfunctions of air pollution control equipment, and combustion and process equipment may result in increased emissions such that the air quality standards may be violated or that health hazards may occur. It is recognized that a variety of steps, including complete shut down of the equipment involved, can be taken to reduce the amount of emissions to a reasonable value. Any source that has an emission rate in excess of 2000 pounds per hour of any pollutant following a malfunction,

or because of the health hazard created by a lesser emission rate than that specified, shall submit a malfunction emission reduction program. Such a malfunction emission reduction program shall be submitted to the Board within 60 days after promulgation of this regulation *[325 IAC 1-3]* for its approval. Documentation shall include, but not be limited to, the normal operating emission rate, the malfunction emission rate, and the program proposed to reduce emissions to a reasonable emission rate. The program shall be based on the best practical estimates of type and number of malfunctions experienced during the past 12 months of normal operation, and the scope and duration of such malfunctions. *(Air Pollution Control Board; APC 3, Sec. 4; filed Oct. 7, 1974, 10:55 am: Rules and Regs. 1975, p. 123)*

Cited in: 325 IAC 1-3-1; 325 IAC 1-3-3.

325 IAC 1-3-5 Federal new source performance standards

Authority: IC 13-1-1-4; IC 13-7-5-1

Affected: IC 13-1-1-1

Sec. 5. Federal New Source Performance Standards. In addition to the requirements set forth herein, all new sources for which federal standards have been promulgated shall comply with the applicable portions of the Federal New Source Performance Standards 40 CFR Part 60. *(Air Pollution Control Board; APC 3, Sec. 5; filed Oct. 7, 1974, 10:55 am: Rules and Regs. 1975, p. 124)*

1979 APC–3

Rule 3. Repealed

(Repealed by Air Pollution Control Board; filed Jun 19, 1979, 2:25 pm: 2 IR 1118)

Rule 3.1. Visible Emission Limitations

325 IAC 1-3.1-1 Definitions
325 IAC 1-3.1-2 Applicability of rule
325 IAC 1-3.1-3 Emission limitations
325 IAC 1-3.1-4 Temporary exemptions
325 IAC 1-3.1-5 Procedure to determine compliance
325 IAC 1-3.1-6 Special considerations

325 IAC 1-3.1-7 Compliance timetables
325 IAC 1-3.1-8 Exemptions as revisions to state implementation plan
325 IAC 1-3.1-9 Repealer
325 IAC 1-3.1-10 Force and effect of existing emission limitations or control strategies
325 IAC 1-3.1-11 Savings clause
325 IAC 1-3.1-12 Severability of rule

325 IAC 1-3.1-1 Definitions

Authority: IC 13-1-1-4; IC 13-1-1-5; IC 13-7-5-1
Affected: IC 13-1-1-2

Sec. 1. Definitions. (a) Definitions applicable to this regulation *[325 IAC 1-3.1]* are set forth in Regulation APC 1 *[325 IAC 1-1-2.5]. (Air Pollution Control Board; APC 3, Sec. 1; filed Jun 19, 1979, 2:25 pm: 2 IR 1114)*

Cited in: 325 IAC 1-3.1-1; 325 IAC 1-3.1-2; 325 IAC 1-3.1-6; 325 IAC 1-3.1-9; 325 IAC 1-3.1-10; 325 IAC 1-3.1-11; 325 IAC 1-20-2; 325 IAC 1-20-3; 325 IAC 1-21-7; 325 IAC 1-22-3.

325 IAC 1-3.1-2 Applicability of rule

Authority: IC 13-1-1-4; IC 13-1-1-5; IC 13-7-5-1
Affected: IC 13-1-1; IC 13-7-7-5

Sec. 2. Applicability. (a) This regulation *[325 IAC 1-3-1]* shall apply to all visible emissions emitted by or from any facility or source except those sources or facilities for which specific emission limitations are established by Regulations APC 9 *[325 IAC 1-22]*, APC 20 *[325 IAC 1-17]* or APC 23 *[325 IAC 1-20]*.

(b) The requirements of Section 3(a)(1) *[325 IAC 1-3.1-3(a)(1)]* shall apply to attainment areas for particulate matter and those nonattainment areas of counties not listed in paragraph (c) below.

(c) The requirements of Section 3(a)(2) *[325 IAC 1-3.1-3(a)(2)]* shall apply to the nonattainment areas of the following counties as set forth in Regulation APC 22 *[325 IAC 1-18.1]*:

(1) Dearborn

(2) Dubois

(3) Vigo

(4) Wayne

(Air Pollution Control Board; APC 3, Sec. 2; filed Jun 19, 1979, 2:25 pm: 2 IR 1114)

325 IAC 1-3.1-3 Emission limitations

Authority: IC 13-1-1-4; IC 13-1-1-5; IC 13-7-5-1
Affected: IC 13-1-1; IC 13-7-7-5; IC 13-7-10-3

Sec. 3. Emission Limitations. (a) Unless otherwise excepted or limited in subsequent parts of this section, Section 4 *[325 IAC 1-3.1-4]* or Section 6 *[325 IAC 1-3.1-6]*, visible emissions from any source or facility shall not exceed any of the following. Unless otherwise stated, all visible emissions shall be observed in accordance with the procedures set forth in Section 5 *[325 IAC 1-3.1-5]* of this regulation:

(1) For sources of facilities located in attainment areas for particulate matter.

(A) For continuous emissions from a stack, an average of 24 readings of 40% opacity as determined in Section 5 *[325 IAC 1-3.1-5]*.

(B) For intermittent emissions from a stack, a cumulative total of 15 minutes (60 readings) in a 24-hour period of 40% opacity observed in accordance with the procedures set forth in Section 5 *[325 IAC 1-3.1-5]*.

(C) For non-stack sources or facilities, emissions therefrom shall be limited by the requirements set forth in Regulation APC 20 *[325 IAC 1-17]*.

(D) Fugitive dust emissions shall comply with Regulation APC 20 *[325 IAC 1-17]*.

(2) For sources or facilities located in nonattainment areas for particulate matter.

(A) For continuous emissions from a stack, an average of 24 readings of 30% opacity as determined in Section 5 *[325 IAC 1-3.1-5]*.

(B) For intermittent emissions from a stack, a cumulative total of 3.75 minutes (15 readings) in a 3-hour period

of 30% opacity observed in accordance with the procedures set forth in Section 5 *[325 IAC 1-3.1-5].*

(C) Fugitive dust emissions shall comply with Regulation APC 20 *[325 IAC 1-17].*

(b) Fuel Combustion Steam Generators—A fuel combustion steam generator shall mean any furnace or boiler of more than 63 million kilocalories (kcal) per hour heat input (250 million Btu per hour) used in the process of burning solid, liquid or gaseous fuel or any combination thereof for the purpose of producing steam by heat transfer.

(1) No person shall operate a fuel combustion steam generator for which construction or modification commenced after August 17, 1971, so as to produce, cause, or allow visible emissions exceeding 20% opacity except for one period of six consecutive minutes per hour wherein visible emissions may average up to 27% opacity.

(c) Portland Cement Plants—A Portland Cement Plant is defined as any facility manufacturing Portland Cement by either the wet or dry process.

(1) No person shall operate any facility of a Portland Cement Plant for which construction or modification commenced after August 17, 1971, so as to produce, cause, or allow visible emissions to be emitted exceeding 10% opacity except that any kiln shall be limited to 20% opacity.

(d) Nitric Acid Plants—A nitric acid plant is defined as any facility producing weak nitric acid, defined as acid which is 30-70% in strength, by either the pressure or atmospheric pressure process.

(1) No person shall operate any nitric acid plant for which construction or modification commenced after August 17, 1971, so as to produce, cause, or allow visible emissions to be emitted exceeding 10% opacity.

(e) Sulfuric Acid Plants—A sulfuric acid plant is defined as any facility producing sulfuric acid by the contact process by burning elemental sulfur, alkyalton acid, hydrogen sulfite organic sulfite and mercaptans, or acid sludge, but does not

include facilities where conversion to sulfuric acid is utilized primarily as a means of preventing emissions to the atmosphere of sulfur dioxide or other sulfur compounds.

(1) No person shall operate any sulfuric acid plant for which construction or modification commenced after August 17, 1971, so as to produce, cause, or allow visible emissions to be emitted exceeding 10% opacity.

(f) Petroleum Refineries—A petroleum refinery is defined as any facility engaged in producing gasoline, kerosene, distillate fuel oils, residual fuel oils, lubricants, or other products through distillation of petroleum or through redistillation, cracking, or reforming of unfinished petroleum derivatives.

(1) No person shall operate any fluid catalytic cracking unit catalyst regenerator or fluid catalytic cracking unit incinerator-waste heat boiler for which construction or modification commenced after June 11, 1973, so as to produce, cause, or allow visible emission to be emitted exceeding 25% opacity except for one period of six (6) minutes per hour wherein the average may exceed 25%.

(g) Secondary Lead Smelters—A secondary lead smelter is defined as any facility producing lead from lead-bearing scrap material by smelting to the metallic form.

(1) No person shall operate any blast or reverberatory furnace of a secondary lead smelter for which construction or modification commenced after June 11, 1973, so as to produce, cause, or allow visible emissions to be emitted exceeding 20% opacity, except that the pot furnaces shall be limited to 10% opacity.

(h) Secondary Brass and Bronze Ingot Production Plants—Reverberatory and electric furnaces of 1,000 kg (2,205 lb) or greater capacity and blast (cupola) furnaces of 250 kg/hr (550 lb/hr) or greater production capacity of secondary brass and bronze ingot production plants shall comply with this section.

(1) No person shall operate any reverberatory furnace for which construction or modification commenced after June 11, 1973, so as to produce, cause, or allow visible emissions to be emitted exceeding 20% opacity.

(2) No person shall operate any blast (cupola) or electric furnace, for which modification or construction commenced after June 11, 1973, so as to produce, cause, or allow visible emissions to be emitted, exceeding 10% opacity.

(i) Sewage Sludge Incinerators—Incinerators which burn sludge produced by municipal sewage treatment plants shall comply with this section.

(1) No person shall operate any sewage sludge incinerator for which modification or construction commenced after June 11, 1973, so as to produce, cause, or allow visible emissions to be emitted exceeding 20% opacity.

(j) Primary Copper Smelters—A primary copper smelter is defined as any installation or any intermediate process engaged in the production of copper from copper sulfide or concentrates through the use of pyrometallurgical techniques.

(1) No person shall operate any dryer of a primary copper smelter for which modification or construction commenced after January 15, 1976, so as to produce, cause, or allow visible emissions to be emitted exceeding 20% opacity.

(2) No person shall operate any affected facility of a primary copper smelter that uses a sulfuric acid plant to comply with the applicable sulfuric acid standard for which modification or construction commenced after January 15, 1976, so as to produce, cause, or allow visible emissions to be emitted exceeding 20% opacity.

(k) Primary Zinc Smelters—A primary zinc smelter is defined as any installation engaged in the production, or in any intermediate process in the production of zinc or zinc oxide, zinc sulfide or concentrates through the use of pyrometallurgical techniques.

(1) No person shall operate a sintering machine of a primary zinc smelter for which modification or construction commenced after January 15, 1976, so as to produce, cause, or allow visible emissions to be emitted exceeding 20% opacity.

(2) No person shall operate any affected facility of a primary zinc smelter which employs a sulfuric acid plant to limit sulfur dioxide emissions to levels in compliance with Regulation APC 13 *[325 IAC 10.2]* and which was constructed or modified after January 15, 1976, so as to produce, cause, or allow visible emissions to be emitted exceeding 20% opacity.

(l) Primary Lead Smelters—A primary lead smelter is defined as any installation or intermediate process engaged in the production of lead from lead sulfide or concentrates through the use of pyrometallurgical techniques.

(1) No person shall operate any blast furnace, dross reverberatory furnace, or sintering machine discharge end of a primary lead smelter for which construction or modification commenced after January 15, 1976, so as to produce, cause, or allow visible emissions to be emitted exceeding 20% opacity.

(2) No person shall operate any facility of a primary lead smelter which employs a sulfuric acid plant to limit sulfur dioxide emissions to levels in compliance with Regulation APC 13 *[325 IAC 10.2]* and which was constructed or modified after January 15, 1976, so as to produce, cause, or allow visible emissions to be emitted exceeding 20% opacity.

(m) Primary Aluminum Reduction Plant—A primary aluminum reduction plant is defined as any facility manufacturing aluminum by electrolytic reduction.

(1) No person shall operate any potroom of a primary aluminum reduction plant for which construction or modification commenced after January 26, 1976, so as to produce, cause, or allow visible emissions to be emitted exceeding 10% opacity.

(2) No person shall operate any anode bake plant of a primary aluminum reduction plant constructed after January 26, 1976, so as to produce, cause, or allow visible emissions to be emitted exceeding 20% opacity.

(n) Coal Preparation Plants—A coal preparation plant is defined as any facility (excluding underground mining operations) which prepares coal by one or more of the following processes: breaking, crushing, screening, wet or dry cleaning, and thermal drying.

(1) No person shall operate any thermal dryer of a coal preparation plant for which construction or modification commenced after January 15, 1976, so as to produce, cause, or allow visible emissions to be emitted exceeding 10% opacity.

(2) No person shall operate any coal processing and conveying equipment, coal storage system, or coal transfer and loading system for processing coal constructed after January 15, 1976, so as to produce, cause, or allow visible emissions to be emitted exceeding 20% opacity.

(o) Grain Elevators—Grain elevators are defined as any plant or installation at which grain is unloaded, handled, cleaned, dried, stored, or loaded. Any facility for which construction or modification commenced on or after August 3, 1978, shall comply with this section. This section shall apply to any grain storage elevator located at any grain processing source which has a permanent grain storage capacity of 35,200 cubic meters (1 million U.S. bushels) and any grain terminal elevator which has a permanent grain storage capacity of 88,100 cubic meters (2.5 million U.S. bushels). All opacity values for this subsection (O) shall be observed and measured in accordance with the procedures set forth subsections 5(a)-(c), (g) and (h) *[325 IAC 1-3.1-5(a)-(c), (g) and (h)]* of this regulation.

(1) On or after the 60th day of achieving the maximum production rate at which the affected facility will be operated, but no later than 180 days after initial startup, no owner or operator subject to the provision of this subpart shal cause to be discharged to the atmosphere any gases which exhibit greater than 0% opacity from any:

(A) Column dryer with column plate perforation exceeding 2.4 mm diameter (0.094 inch).

(B) Rack dryer in which exhaust gases pass through a screenfilter coarser than 50 mesh.

(2) No owner or operator subject to the provisions of this subpart shall cause to be discharged into the atmosphere from any affected facility except a grain dryer any process emission which:

(A) Exhibits greater than 0% opacity.

(3) On or after the 60th day of achieving the maximum production rate at which the affected facility will be operated, but no later than 180 days after initial startup, no owner or operator subject to the provisions of this subpart shall cause to be discharged into the atmosphere any fugutive emission from:

(A) Any individual truck unloading station, railcar loading or unloading station, which exhibits greater than 5% opacity.

(B) Any grain handling operation which exhibits greater than 0% opacity.

(C) Any truck loading station which exhibits greater than 10% opacity.

(D) Any barge or ship loading station which exhibits greater than 20% opacity.

(4) The owner or operator of any barge or ship unloading station shall operate as follows:

(A) The unloading leg shall be enclosed from the top (including the receiving hopper) to the center line of the bottom pulley and ventilation to a control device shall be maintained on both sides of the leg and the grain receiving hopper.

(B) The total rate of air ventilated shall be at least 32.1 actual cubic meters per cubic meter of grain handling capacity (40 cubic foot per bushel).

(C) Rather than meeting (1) and (2) above, the owner or operator may use other methods of emission control if it is demonstrated to the Board they would achieve comparable emission reduction.

(Air Pollution Control Board; APC 3, Sec 3; filed Jun 19, 1979, 2:25 pm: 2 IR 1114)

Cited in: 325 IAC 1-3.1-2; 325 IAC 1-3.1-4; 325 IAC 1-3.1-5; 325 IAC 1-3.1-6; 325 IAC 1-3.1-7; 35 IAC 1-3.1-8.

325 IAC 1-3.1-4. Temporary exemptions

Authority: IC 13-1-1-4; IC 13-1-1-5; IC 13-7-5-1
Affected: IC 13-1-1; IC 13-7-7-5; IC 13-7-10-3

Sec. 4. Temporary Exemptions from Section 3(a). (a) Boiler Startup and Shutdown—When building a new fire in a boiler, or shutting down a boiler, visible emissions may exceed the applicable opacity limit established in Section 3(a) *[325 IAC 1-3.1-3(a)]*; however, visible emissions shall not exceed 60% opacity and emissions in excess of the applicable opacity limit shall not continue for more than 10 continuous minutes on one occasion in any 24-hour period.

(b) Cleaning Boilers—When cleaning a fire in a boiler or blowing tubes, visible emissions may exceed the applicable opacity limit established in Section 3(a) *[325 IAC 1-3.1-3(a)]*; however, visible emissions shall not exceed 60% opacity and visible emissions in excess of the applicable opacity limit shall not continue for more than five continuous minutes on one occasion in any 60-minute period. Such emissions shall not be permitted on more than three occasions in any 12-hour period.

(c) Facilities not temporarily exempted by Subsections (a) and (b) above may be granted special temporary exemptions by the Board of the same duration and type authorized therein provided that the facility proves to the satisfaction of the Board that said exemptions are needed and that during periods of startup and shutdown, owners and operators shall, to the extent practicable, maintain and operate any affected facility including air pollution control equipment in a manner consistent with good air pollution control practice for minimizing emissions. Determination of whether acceptable operating and maintenance procedures are being used will be based on information available to the Board, which may include, but is not limited to, monitoring results, opacity observations, review of operating and maintenance proce-

dures and inspection of the source. *(Air Pollution Control Board; APC 3, Sec 4; filed Jun 19, 1979, 2:25 pm: 2 IR 1117)*

Cited in: 325 IAC 1-3.1-3; 325 IAC 1-3.1-6; 325 IAC 1-3.1-8.

325 IAC 1-3.1-5 Procedure to determine compliance

Authority: IC 13-1-1-4; IC 13-1-1-5; IC 13-7-5-1
Affected: IC 13-1-1; IC 13-7-7-5

Sec 5. Procedure to Determine Compliance with Section 3. (a) Position—The qualified observer shall stand at a distance sufficient to provide a clear view of the emissions with the sun, if visible, oriented in the 140° sector to his back. Consistent with maintaining the above requirement, the observer shall, as much as possible, make his observations from a position such that his line of vision is approximately perpendicular to the direction of the visible emissions (plume where applicable), and when observing opacity of emissions from rectangular outlets (e.g., monitors, open baghouses, noncircular stacks), approximately perpendicular to the longer axis of the outlet. The observer's line of sight should not include more than one plume at a time when multiple stacks are involved, and in any case the observer should make his observations with his line of sight perpendicular to the longer axis of such a set of multiple stacks (e.g., stub stacks on baghouses).

(b) Field Records—The observer shall record the name of the plant, emission location, type facility, observer's name and affiliation, and the date on a field data sheet. Time, estimated distance to the emission location, approximate wind direction, estimated wind speed, description of the sky conditions (presence and color of clouds), and visible emission (plume where applicable) background are recorded on a field data sheet at the time opacity readings are initiated and completed.

(c) Observations—Opacity observations shall be made at the point of greatest opacity in that portion of the visible emissions, (plume where applicable) where condensed water vapor is not present. The observer shall not look continuously at the visible emissions, (plume where applicable) but instead

shall observe the visible emissions, (plume where applicable) momentarily at 15-second intervals.

(d) Recording Observations—Opacity observations shall be recorded to the nearest 5% at 15-second intervals on an observational record sheet. A minimum of 24 observations shall be recorded. Each momentary observation shall be deemed to represent the average opacity of emissions for a 15-second period.

(e) Data Reduction for Continuous Sources—Opacity shall be determined as an average of 24 consecutive observations recorded at 15-second intervals. Divide the observations recorded on the record sheet into sets of 24 consecutive observations. A set is composed of any 24 consecutive observations. Sets need not be consecutive in time and in no case shall two sets overlap. For each set of 24 observations, calculate the average by summing the opacity of the 24 observations and dividing this sum by 24. Record the average opacity on a record sheet.

(f) Data Reduction for Intermittent Sources—For emissions from intermittent sources, opacity shall be determined in accordance with subsections (a), (b), (c) and the first sentence of (d). Each momentary observation shall be deemed to represent the average opacity of emissions for a 15 second period. All readings greater than the specified limit in Section 3 *[325 IAC 1-3.1-3]* shall be accumulated as 15 second segments for comparison with the limit.

(g) Attached Steam Plumes—When condensed water vapor is present within the plume as it emerges from the emission outlet, opacity observations shall be made beyond the point in the plume at which condensed water vapor is no longer visible. The observer shall record the approximate distance from the emission outlet to the point in the plume at which the observations are made.

(h) Detached Steam Plumes—When water vapor in the plume condenses and becomes visible at a distinct distance from the emission outlet, the opacity of emissions should be evaluated at the emission outlet prior to the condensation of

water vapor and the formation of the steam plume. *(Air Pollution Control Board; APC 3, Sec 5; filed Jun 19, 1979, 2:25 pm: 2 IR 1117)*

Cited in: 325 IAC 1-3.1-3.

325 IAC 1-3.1-6 Special considerations

Authority: IC 13-1-1-4; IC 13-1-1-5; IC 13-7-5-1
Affected: IC 13-1-1; IC 13-7-7-5

Sec. 6. Special Considerations. (a) Alternative compliance requirements in lieu of those set forth in Sections 3(a) and 4 *[325 IAC 1-3.1-3(a) and 325 IAC 1-3.1-4]* may be granted by the Board provided that all the following conditions are met:

(1) The exemption is requested for a specific operation;

(2) It is shown and documented that no Reasonably Available Control Technology is available;

(3) There will be no violation of any ambient air quality standards; and

(4) Said exemption is set forth in a valid operation permit, issued in accordance with the procedures with Regulation APC 19 *[325 IAC 1-16.1]*, with said permit setting forth, in, detail, the specific terms of time and opacity limitations granted.

(b) A violation of Regulation APC 3 *[325 IAC 1-3.1]* shall constitute prima facie evidence of a violation of other applicable particulate emission control regulations. A violation of any such regulation can be refuted by a stack test conducted in accordance with the Board's Source Sampling Policy, or other evidence acceptable to the Board. Any such refutation, however, will in no way refute the violation of this regulation *[325 IAC 1-3.1]. (Air Pollution Control Board; APC 3, Sec 6; filed Jun 19, 1979, 2:25 pm: 2 IR 1118)*

Cited in: IAC 1-3.1-3; 325 IAC 1-3.1-8.

325 IAC 1-3.1-7 Compliance timetables

Authority: IC 13-1-1-4; IC 13-1-1-5; IC 13-7-5-1
Affected: IC 13-1-1; IC 13-7-7-5

Sec. 7. Compliance Timetables. Sources newly subject to more stringent limitations than existing at the promulgation date of this Regulation *[325 IAC 1-3.1]* by Section 3 *[325 IAC 1-3.1-3]* shall comply with the compliance schedule of Regulation APC 23 *[325 IAC 1-20]. (Air Pollution Control Board; APC 3, Sec. 7; filed June 19, 1979, 2:25 pm: 2 IR 1118)*

325 IAC 1-3.1-8 Exemptions as revisions to state implementation plan

Authority: IC 13-1-1-4; IC 13-1-1-5; IC 13-7-5-1
Affected: IC 13-1-1; IC 13-7-7-5

Sec. 8. SIP Revision. Any exemptions given or provisions granted to this regulation *[325 IAC 1-3.1]* by the Board in Sections 3(o)(4)(c) *[325 IAC 1-3.1-3(o)(4)(c)]* 4(c) *[325 IAC 1-3.1-4(c)]* or 6(a) *[325 IAC 1-3.1-6(a)]* shall be submitted to the U.S. EPA as revisions to the State Implementation Plan.

(Air Pollution Control Board; APC 3, Sec. 8; filed June 19, 1979, 2:25 pm: 2 IR 1118)

325 IAC 1-3.1-9 Repealer

Authority: IC 13-1-1-4; IC 13-1-1-5; IC 13-7-5-1
Affected: IC 13-1-1; IC 13-7-7-5

Sec. 9. Repealer. (a) Upon promulgation of this regulation, Regulation APC 3 *[325 IAC 1-3.1]*, promulgated October 7, 1974, is hereby repealed in its entirety, except as provided by Section 10 *[325 IAC 1-3.1-10]* herein. *(Air Pollution Control Board; APC 3, Sec. 9; filed June 19, 1979, 2:25 pm: 2 IR 1118)*

325 IAC 1-3.1-10 Force and effect of existing emission limitations or control strategies

Authority: IC 13-1-1-4; IC 13-1-1-5; IC 13-7-5-1
Affected: IC 13-1-1; IC 13-7-7-5

Sec. 10. Force and Effect. Any emission limitation or control strategy set forth in Regulation APC 3 *[325 IAC 1]* promulgated October 7, 1974, which applies to facilities which are also subject to emission limitations or control strategies

in this regulation *[325 IAC 1-3.1]* shall remain in full force and effect until there is full compliance by subject facilities and sources with the emission limitations or control strategies set forth herein. *(Air Pollution Control Board; APC 3, Sec. 10; filed June 19, 1979, 2:25 pm: 2 IR 1118)*

Cited in: 325 IAC 1-3.1-9.

325 IAC 1-3.1-11 Savings clause

Authority: IC 13-1-1-4; IC 13-1-1-5; IC 13-7-5-1
Affected: IC 13-1-1; IC 13-7-7-5

Sec. 11. Savings Clause. The repeal of Regulation APC 3 *[325 IAC 1-3]*, promulgated October 7, 1974, shall not have the effect to release or extinguish any penalty or forfeiture incurred under the same and such Regulation shall be treated as still remaining in force for the purpose of sustaining any proper action, or prosecution for the enforcement of such penalty, forfeiture or liability. *(Air Pollution Control Board; APC 3, Sec. 11; filed June 19, 1979, 2:25 pm: 2 IR 1118)*

325 IAC 1-3.1-12 Severability of rule

Authority: IC 13-1-1-4; IC 13-1-1-5; IC 13-7-5-1
Affected: IC 13-1-1; IC 13-7-7-5

Sec. 12. Severability. If any section, paragraph, sentence, clause, phrase, or word of this regulation *[325 IAC 1-3.1]* or any other part hereof, is declared unconstitutional or invalid for any reason, the remainder of said regulation shall not be affected thereby and shall remain in full force and effect. *(Air Pollution Control Board; APC 3, Sec. 12; filed June 19, 1979, 2:25 pm: 2 IR 1118)*

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ARTICLE 5. OPACITY REGULATIONS

Rule 1. Opacity Limitations

Rule 1. Opacity Limitations

Cited in: 325 IAC 3-1-8; 325 IAC 4-2-2; 325 IAC 4-2-3; 325 IAC 5-1-1; 325 IAC 5-1-4; 325 IAC 5-1-5; 325 IAC 5-1-7; 325 IAC 6-1-2; 325 IAC 11-3-2.

325 IAC 5-1-1 Applicability
325 IAC 5-1-2 Emission limitations
325 IAC 5-1-3 Temporary exemptions
325 IAC 5-1-4 Procedure to determine compliance
325 IAC 5-1-5 Special considerations
325 IAC 5-1-6 Compliance timetables
325 IAC 5-1-7 SIP revision

325 IAC 5-1-1 Applicability

Authority: IC 13-1-1-4; IC 13-7-5-1
Affected: IC 13-1-1-1; IC 13-1-1-4; IC 13-7-1-1; IC 13-7-5-1; IC 13-7-7-5

Sec. 1. Applicability. (a) This rule *[325 IAC 5-1]* shall apply to all visible emissions (not including condensed water vapor) emitted by or from any facility or source except those sources or facilities for which specific visible emission limitations are established by 325 IAC, Article 11, 325 IAC, Article 12, or 325 IAC, Article 6.

(1) The requirements of Section 2(a)(1) *[325 IAC 5-1-2(a)(1)]* shall apply to sources or facilities located in attainment areas for particulate matter, designated in 325 IAC 1.1-3 (formerly known as APC 22).

(2) The requirements of Section 2(a)(2) *[325 IAC 5-1-2-(a)(2)]* shall apply to sources or facilities located in nonattainment areas for particulate matter as designated in 325 IAC 1.1-3 (formerly known as APC 22).

(b) Sources or facilities located in areas designated as unclassifiable or attainment areas in 325 IAC 1.1-3 (formerly Regulation APC 22) which become subject to more stringent limitations as a result of said area being redesignated as a nonattainment area by the Board, shall comply with such limitations as expeditiously as practicable, but no later than December 31, 1982. No later than 60 days after the promulgation of the nonattainment designation in 325 IAC 1.1-3, all sources or facilities subjected to more stringent visible emission limitations by their redesignation shall submit to the Board for approval a schedule for attaining compliance with this Rule *[325 IAC 5-1]. (Air Pollution Control Board; 325 IAC 5-1-1; filed Aug 27, 1980, 4:20 pm: 3 IR 1626)*

325 IAC 5-1-2 Emission limitations

Authority: IC 13-1-1-4; IC 13-7-5-1

Affected: IC 13-1-1-1; IC 13-1-1-4; IC 13-7-1-1; IC 13-7-5-1; IC 13-7-7-5

Sec. 2. Emission Limitations. (a) Visible emissions from any source or facility shall not exceed any of the following limitations. Unless otherwise stated, all visible emissions shall be observed in accordance with the procedures set forth in Section 4 *[325 IAC 5-1-4]* of this rule:

(1) Sources or facilities of visible emissions located in attainment areas for particulate matter shall meet the following limitations:

(A) Visible emissions shall not exceed, an average of 40% opacity in 24 consecutive readings.

(B) Visible emissions shall not exceed 60% opacity for more than a cumulative total of 15 minutes (60 readings) in a 6-hour period.

(2) Sources or facilities of visible emissions located in nonattainment areas shall meet the following limitations:

(A) Visible emissions shall not exceed, an average of 30% opacity in 24 readings.

(B) Visible emissions shall not exceed 60% opacity for more than a cumulative total of 15 minutes (60 readings) in a 6-hour period.

(3) Sources and facilities of visible emissions located in both attainment or nonattainment areas, for which an alternate visible emission limitation has been established pursuant to Section 5(b) *[325 IAC 5-1-5(b)]* herein, shall comply with said limitations in lieu of the limitations set forth in subsection 2(a)(1) and 2(a)(2) preceding.

(Air Pollution Control Board; 325 IAC 5-1-2; filed Aug 27, 1980, 4:20 pm: 3 IR 1626)

Cited in: 325 IAC 5-1-1; 325 IAC 5-1-3; 325 IAC 5-1-4; 325 IAC 5-1-5; 325 IAC 5-1-6.

325 IAC 5-1-3 Temporary exemptions

Authority: IC 13-1-1-4; IC 13-7-5-1

Affected: IC 13-1-1-1; IC 13-1-1-4; IC 13-7-1-1; IC 13-7-5-1; IC 13-7-7-5

Sec. 3. Temporary Exemptions. (a) Boiler Startup and Shutdown—When building a new fire in a boiler, or shutting down a boiler, visible emissions may exceed the applicable opacity limit established in Section 2(a) *[325 IAC 5-1-2(a)]*; however, visible emissions shall not exceed an average of 60% opacity and emissions in excess of the applicable opacity limit shall not continue for more than 10 continuous minutes on one occasion in any 24-hour period.

(b) Cleaning Boilers—When removing ashes from the fuel bed or furnace in a boiler or blowing tubes, visible emissions may exceed the applicable opacity limit established in Section 2(a) *[325 IAC 5-1-2(a)]*; however, visible emissions shall not exceed 60% opacity and visible emissions in excess of the applicable opacity limit shall not continue for more than five continuous minutes on one occasion in any 60-minute period. Such emissions shall not be permitted on more than three occasions in any 12-hour period.

(c) Facilities not temporarily exempted by Subsections (a) and (b) above may be granted special temporary exemptions by the Board of the same duration and type authorized therein provided that the facility proves to the satisfaction of the Board that said exemptions are needed and that during periods of startup and shutdown, owners and operators shall, to the extent practicable, maintain and operate any affected facility including air pollution control equipment in a manner consistent with good air pollution control practice for minimizing emissions. Determination of whether acceptable operating and maintenance procedures are being used will be based on information available to the Board, which may include, but is not limited to, monitoring results, opacity observations, review of operating and maintenance procedures and inspection of the source.

(d) Sources or facilities not exempted through subsections (a), (b), or (c) above may also be granted special exemptions by the Board, provided that the source or facility owner or operator proves to the satisfaction of the Board that said exemption is justifiable. Said exemption(s) may be of longer duration and may apply to other types of facilities not provided for in subsections (a) or (b) above. *(Air Pollution Control Board; 325 IAC 5-1-3; filed Aug 27, 1980, 4:20 pm: 3 IR 1627)*

Cited in: 325 IAC 5-1-7.

325 IAC 5-1-4 Procedure to determine compliance

Authority: IC 13-1-1-4; IC 13-7-5-1

Affected: IC 13-1-1-1; IC 13-1-1-4; IC 13-7-1-1; IC 13-7-5-1; IC 13-7-7-5

Sec. 4. Procedure to Determine Compliance. (a) Determination of visible emissions from sources or facilities to which this rule *[325 IAC 5-1]* applies may be made in accordance with subsections (1) or (2) below.

(1) Determination of visible emissions by means of a qualified observer shall be made according to the following provisions (A) through (H).

(A) Position—The qualified observer shall stand at a distance sufficient to provide a clear view of the emissions with the sun, if visible, oriented in the 140° sector to his back. Consistent with maintaining the above requirement, the observer shall, as much as possible, make his observations from a position such that his line of vision is approximately perpendicular to the direction of the visible emissions (plume where applicable), and when observing opacity of emissions from rectangular outlets (e.g., monitors, open baghouses, noncircular stacks), approximately perpendicular to the longer axis of the outlet. The observer's line of sight should not include more than one plume at a time when multiple stacks are involved, and in any case the observer should make his observations with his line of sight perpendicular to the longer axis of such a set of multiple stacks (e.g., stub stacks on baghouses).

(B) Field Records—The observer shall record the name of the plant, emission location, type of facility, observer's name and affiliation, and the date on a field data sheet. Time, estimated distance to the emission location, approximate wind direction, estimated wind speed, description of the sky conditions (presence and color of clouds), and visible emissions (plume where applicable) background are recorded on a field data sheet at the time opacity readings are initiated and completed.

(C) Observations—Opacity observations shall be made at the point of greatest opacity in that portion of the visible emissions, (plume where applicable) where condensed water vapor is not present. The observer shall not look continuously at the visible emissions, (plume where applicable) but instead shall observe the visible emissions, (plume where applicable) momentarily at 15-second intervals.

(D) Recording Observations—Opacity observations shall be recorded to the nearest 5% at 15-second intervals on an observational record sheet. A minimum of 24 observations shall be recorded. Each momentary observation shall be deemed to represent the average opacity of emissions for a 15-second period.

(E) Determination of Opacity As An Average of 24 Consecutive Observations—Opacity shall be determined as an average of 24 consecutive observations recorded at 15-second intervals. Divide the observations recorded on the record sheet into sets of 24 consecutive observations. A set is composed of any 24 consecutive observations. Sets need not be consecutive in time and in no case shall two sets overlap. For each set of 24 observations, calculate the average by summing the opacity of the 24 observations and dividing this sum by 24. Record the average opacity on a record sheet. For the purpose of determining an alternative visible emission limit in accordance with Section 5(b) *[325 IAC 5-1-5(b)]* following, an average of 24 consecutive readings or more may be used to calculate the alternate visible emissions limit.

(F) Determination of Opacity As A Cumulative Total of 15 Minutes—For emissions from intermittent sources, opacity shall be determined in accordance with subsections (1), (2), (3), and the first sentence of (4). Each momentary observation shall be deemed to represent the average opacity of emissions for a 15 second period. All readings greater than the specified limit in Section 2 *[325 IAC 5-1-2]* shall be accumulated as 15 second segments for comparison with the limit.

(G) Attached Steam Plumes—When condensed water vapor is present within the plume as it emerges from the emission outlet, opacity observations shall be made beyond the point in the plume at which condensed water vapor is no longer visible. The observer shall record the approximate distance from the emission outlet to the point in the plume at which the observations are made.

(H) Detached Steam Plumes—When water vapor in the plume condenses and becomes visible at a distinct distance from the emission outlet, the opacity of emissions should be evaluated at the emission outlet prior to the condensation of water vapor and the formation of the steam plume.

(2) Determination of compliance with visible emission limitations established in this Rule *[325 IAC 5-1]* may also be made in accordance with a source's or facility's continuous monitoring equipment, for any source or facility in compliance with the requirements of 325 IAC 3-1.

(b) If the compliance determination procedures set forth in subsection (1) and (2) preceding results in any conflict in visible emission readings, the determination made in accordance with subsection (2) above shall prevail for the purpose of compliance, provided that it can be shown that the continuous monitor has met the performance specifications as set forth in the U.S. EPA Federal Reference 40 CFR, Part 60, specifically Performance Specification 1. *(Air Pollution Control Board; 325 IAC 5-1-4; filed Aug 27, 1980, 4:20 pm: 3 IR 1627).*

Cited in: 325 IAC 5-1-2; 325 IAC 5-1-5; 325 IAC 12-1-2.

325 IAC 5-1-5 Special considerations

Authority: IC 13-1-1-4; IC 13-7-5-1
Affected: IC 13-1-1-1; IC 13-1-1-4; IC 13-7-1-1; IC 13-7-5-1; IC 13-7-7-5; IC 13-7-16-7

Sec. 5. Special Considerations. (a) A violation of this Rule *[325 IAC 5-1]* shall constitute prima facie evidence of a violation of other applicable particulate emission control regulations. A violation of any such regulation can be refuted by a performance test conducted in accordance with paragraph (b), below. Such test shall refute the mass emission violation only if the source is shown to be in compliance with the allowable mass emission limit. An exceedance of the allowable opacity emission limit will not be treated as a violation if, during the test described in (b) below, the source demonstrates compliance with the allowable mass emission limit while simultaneously having visible emissions more than or equal to the reading at which the exceedance was originally observed.

(b) Establishment or Alternate Visible Emission Limits—The owner or operator of a source or facility which believes it can operate in compliance with the applicable mass emission limitation, but exceeds the limits specified in Section 2 *[325 IAC 5-1-2]* of this Rule, may submit a written petition to the Technical Secretary requesting that an alternate opacity limitation be established pursuant to the following provisions. Additionally, if the Board has issued a Notice of Violation to an owner or operator of a source or facility for violation of the applicable opacity limitation, such owner or operator may, propose in Notice of Violation resolution, to disprove said violation by establishing an alternate opacity limit pursuant to the following provisions. This alternate limit shall be based upon a mass emission performance test conducted according to a method designated by the Board, and a visible emission test conducted simultaneously, according to Section 4 *[325 IAC 5-1-4]* of this Rule. Where the Board determines there is no acceptable test method available, a request for an alternate visible emission limit shall be denied.

(1) The alternate emission limit shall be equal to that level of opacity at which the source or facility will be able, as indicated by the performance and opacity tests, to meet the opacity standard at all times during which the source or facility is meeting the mass emission limitation. However, the Board shall also reserve the right to determine the alternate visible emissions limit in the following manner:

(A) If a performance test of a source or facility demonstrates (i) that said source or facility is in compliance with the allowable mass emissions limit (as defined in 325 IAC 1.1-1) at the time that the test is done, and; (ii) simultaneously, said source's or facility's test demonstrates that the allowable opacity emission limit is being exceeded, then, the enforceable opacity limitation shall be equal to that level of opacity at which the source or facility will be able as indicated by the performance and opacity tests to meet the opacity standard at all times during which the source or facility is meeting the mass emission limitation.

(B) If a performance test of a source or facility demonstrates (i) that said source or facility is in compliance with the allowable mass emission limit, and the test mass emission rate is within 10% of the allowable emissions limit for that source or facility, and; (ii) simultaneously, said source's or facility's test demonstrates that the opacity observed is below the allowable opacity emission limit, the enforceable opacity limitation shall be equal to that level of opacity at which the source or facility will be able, as indicated by the performance and opacity tests, to meet the opacity standard at all times during which the source or facility is meeting the mass emission limitation.

(C) If a performance test of a source or facility demonstrates (i) that said source or facility is in compliance with the allowable mass emission limit, and the test mass emission rate is less than 90% of the allowable emissions limit and; (ii) simultaneously, said source's or

facility's test demonstrates that the opacity observed is below the allowable opacity emission limit, the enforceable opacity limitation shall remain the existing allowable opacity emission limitation for that source or facility.

(2) Compliance with 325 IAC 6-2 (formerly known as APC 4R), 325 IAC 6-3 (formerly known as APC 5), 325 IAC 11-1 (formerly known as APC 6), and 325 IAC 6-1 (formerly known as APC 23), and other applicable regulations must be demonstrated by the performance test.

(3) The Board may require a performance test in any case where it is necessary to determine the compliance status for a facility. However, the Board will not request a performance test for any facility which is known to be in compliance with the allowable opacity limitation.

(4) All alternate visible emission limits shall be established on a source or facility-specific basis. No limitation for any facility or source shall be established by reference to a similar or identical facility or source.

(5) The owner or operator of the source or facility shall notify the Board at least fifteen days prior to conducting a test for the purposes of demonstrating an alternate visible emission limit.

(6) A staff member who is a qualified observer, approved by the Board or other consultant approved by the Board shall be present during any performance tests.

(7) The Cost of the performance test shall be at the expense of the owner or operator.

(8) Any alternate visible emission limit established for any source or facility shall not become effective until said limitation is established in the applicable operating permit. Said limitation will be incorporated, by amendment, into the operating permit for said source or facility and submitted to the U.S. EPA as a SIP revision.

(9) Where a visible emission limitation is based upon a New Source Performance Standard, any new limitation must comply with the provisions of said standard.

(Air Pollution Control Board; 325 IAC 5-1-5; filed Aug 27, 1980, 4:20 pm: 3 IR 1628)

Cited in: 325 IAC 5-1-2; 325 IAC 5-1-4; 325 IAC 5-1-7.

325 IAC 5-1-6 Compliance timetables

Authority: IC 13-1-1-4; IC 13-7-5-1
Affected: IC 13-1-1-1; IC 13-1-1-4; IC 13-7-1-1; IC 13-7-5-1; IC 13-7-7-5

Sec. 6. Compliance Timetable—Sources newly subject to more stringent limitations at the promulgation date of this Rule *[325 IAC 5-1]* by Section 2 *[325 IAC 5-1-2]* shall comply with the compliance schedule of 325 IAC 6-1 (formerly known as APC 23). *(Air Pollution Control Board; 325 IAC 5-1-6; filed Aug 27, 1980, 4:20 pm: 3 IR 1630)*

325 IAC 5-1-7 SIP revision

Authority: IC 13-1-1-4; IC 13-7-5-1
Affected: IC 13-1-1-4; IC 13-7-5-1

Sec. 7. SIP Revision—Any exemptions given or provisions granted to this rule *[325 IAC 5-1]* by the Board in Sections 3(c) *[325 IAC 5-1-3(c)]* or 5(b) *[325 IAC 5-1-5(b)]* shall be submitted to the U.S. EPA as revisions to the State Implementation Plan. *(Air Pollution Control Board; 325 IAC 5-1-7; filed Aug 27, 1980, 4:20 pm: 3 IR 1630)*

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37 Fed. Reg. 10, 842-47; 63-65 (1972)

Title 40—PROTECTION OF ENVIRONMENT

Chapter I—Environmental Protection Agency

Subchapter C—Air Programs

Part 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

On April 30, 1971 (36 F.R. 8186), pursuant to section 109 of the Clean Air Act, as amended, the Administrator promulgated national ambient air quality standards for sulfur oxides, particulate matter, carbon monoxide, photochemical oxidants, hydrocarbons, and nitrogen dioxide. Within 9 months thereafter, each State was required by section 110 of the Act to adopt and submit to the Administrator a plan

which provides for the implementation, maintenance, and enforcement of national ambient air quality standards within each air quality control region in the State. An additional period of no longer than 18 months may be allowed for adoption and submittal of that portion of a plan relating to implementation of secondary ambient air quality standards. State plans must provide for attainment of national primary ambient air quality standards within 3 years after the date of the Administrator's approval of such plans, except that a 2-year extension of this deadline may be granted by the Administrator. State plans must provide for attainment of national secondary ambient air quality standards within a reasonable time. Within 4 months from the date on which State plans were required to be submitted, the Administrator must approve or disapprove such plans or portions thereof.

On August 14, 1971 (36 F.R. 15486), the Administrator promulgated regulations (40 CFR Part 51) (formerly 42 CFR Part 420, but transferred to Chapter I of Title 40 by publication in the FEDERAL REGISTER, page 22369 et seq., November 25, 1971) setting forth requirements for preparation, adoption, and submittal of State implementation plans. These regulations were amended October 23, 1971 (36 F.R. 20513), and December 30, 1971 (36 F.R. 25233), to make certain additions and corrections. The Administrator's regulations (40 CFR Part 51) provided generally that State plans must set forth a control strategy for attainment and maintenance of the national standards; legally enforceable regulations and compliance schedules for implementation of the control strategy; a contingency plan for preventing the occurrence of air pollution levels which would cause significant harm to the health of persons; source surveillance procedures; procedures to assure that construction or modification of stationary sources will not interfere with attainment or maintenance of the national standards; provisions for air quality surveillance; a description of the resources needed to carry out the State plan; and provisions for intergovernmental cooperation. Some of the requirements vary by air quality control region in accordance with a classification scheme set forth in 40 CFR 51.3. Each State plan

must also show that the State has the legal authority necessary to carry out the plan, as specified by 40 CFR 51.11. States were required to conduct one or more public hearings prior to adoption of their implementation plans.

All 50 States, plus the District of Columbia, Puerto Rico, Virgin Islands, Guam, and American Samoa have submitted implementation plans. The Administrator's approvals and disapprovals are set forth below. A more detailed description of disapproved portions, together with an explanation of the basis of disapproval, will be provided to the States; copies of these Evaluation Reports will be available for public inspection at the Environmental Protection Agency, 401 M Street SW., Washington, D.C., and in the Agency's Regional Offices.

Where the Administrator disapproves a State plan or portion thereof, or where a State fails to submit an implementation plan or portion thereof, the Administrator is required, under section 110(c) of the Act, to propose and subsequently promulgate regulations setting forth a substitute implementation plan or portion thereof. Where regulatory portions of a State plan, including control strategies and related rules and regulations, are disapproved or were not submitted, regulations setting forth substitute portions will be proposed and promulgated. When disapproved portions are of a nonregulatory nature, e.g., air quality surveilance, resources, intergovernmental cooperation, and therefore are not susceptible to correction through promulgation of regulations by the Administrator, detailed comments will be included in the evaluation report; in such cases, the Environmental Protection Agency will work with the States to correct the deficiencies.

To the extent possible, the Administrator's evaluation of State plans reflects the latest information submitted by the States. In the interest of giving States every opportunity to bring their implementation plans into full compliance with the Act and 40 CFR Part 51, the Environmental Protection Agency has notified States that modifications submitted after the statutory deadline for submittal of States plans would be accepted and considered: *Provided*, That such modifications were made and submitted in accordance with the

requirements of 40 CFR Part 51. Accordingly, many States have been, and still are, making and submitting modifications of their implementation plans. Where such modifications affect the Administrator's approval or disapproval of a State plan or portion thereof, but are not reflected herein, appropriate changes to this part will be published as soon as the Administrator's evaluation of such modifications is completed.

The Act directs the Administrator to require a State to revise its implementation plan whenever he finds that it is substantially inadequate for attainment and maintenance of a national standard. In accordance with the statutory mandate, the Environmental Protection Agency will make a continuing evaluation of the State plans and will, as necessary, call upon the States to make revisions.

Evaluation of Legal Authority

States were required to have the legal authority specified in the Administrator's regulations. With one exception, States were required to have the specified legal authority available to them at the time they submitted their implementation plans. The one exception is authority to carry out land-use and transportation control measures; where a State's control strategy includes such measures, the State plan must set forth a timetable for obtaining the necessary legal authority. Where it was determined that a State's air pollution control statute does not explicitly provide all of the required legal authority, the State's attorney general was consulted for an opinion as to whether the necessary authority is conferred by a general grant of powers in the air pollution control statute or provided in other statutes. Where a State plan indicated that one or more local agencies will be responsible for carrying out any portion of the implementation plan, a similar assessment was made of the legal authority available to such local agencies. A complete record of the Environmental Protection Agency's assessment of legal authority is maintained in the Office of the Associate General Counsel, Air Quality and Radiation Division, Rockville, Md. 20852.

Delegation of Legal Authority

The legal authority which each State was required to have carry out its implementation plan is specified by 40 CFR 51.11. Subparagraphs (5) and (6) of § 51.11(a) require each State to have the authority to obtain information to determine compliance with applicable laws and regulations; require recordkeeping; make inspections; conduct tests; require sources to install and maintain monitoring equipment; require periodic reporting; and release emission data to the public. The Administrator has such authority under section 114 of the Act and can delegate it to States. Where a State lacks the authority required by 40 CFR 51.11(a) (5) or (6), that portion of its implementation plan is disapproved herein; however, if the State has requested delegation of the Administrator's authority, and if the State's source surveillance procedures are approvable, the needed authority is delegated herein. Where a State lacks the authority required by 40 CFR 51.11(a) (5) or (6) but has not requested delegation of authority, the Administrator cannot approve source surveillance procedures even though the procedures may be technically adequate. The State can correct this deficiency by requesting a delegation of authority; such requests may be made at any time and should be addressed to the appropriate Regional Administrator.

Attainment of Primary Standards

The Act requires attainment of primary standards as expeditiously as practicable, but not later than 3 years from the date of the Administrator's approval of a State plan except where an extension is granted by the Administrator; it requires attainment of secondary standards within a reasonable time. Except where extensions have been requested, State plans, generally provide for attainment of the primary standards in 3 years. Whether more expeditious attainment of the primary standards is practicable is a question that will be subject to continuing examination in connection with the Administrator's review of the compliance schedules and progress reports to be submitted by the States

and as part of the Administrator's continuing surveillance of State activities. It is already clear, however, that the aggregate emission control requirements of the 55 State plans will create such a great demand for clean fuels, emission control equipment, and other items that attainment of the primary standards in many urban areas in significantly less time than 3 years generally will not be feasible.

Attainment Dates

Each State plan must specify the projected dates of attainment of primary and secondary standards. Where a State plan sets forth a control strategy and regulations adequate for attainment of the national standards within the time periods prescribed by the Act but fails to specify an attainment date, the Administrator will promulgate attainment dates meeting the requirements of the Act.

Maintenance of Standards

Where existing air pollution levels exceed the national standards, State plans were expected to provide for the degree of emission reduction necessary for attainment and maintenance of the national standards, including the degree of emission reduction necessary to offset the probable impact of projected growth of population, industrial activity, motor vehicle traffic or other factors. There is a great deal of uncertainty involved in projecting growth and predicting its impact on air quality. Growth projections extending more than 2 or 3 years into the future are necessarily generalized and inevitably are based on a variety of assumptions, many of them which are, at best, tenuous. Even where growth policies have been adopted by State or local governments, they normally provide only general guidelines. Techniques for translating generalized projections of population and industrial growth into predictions of future air quality do not exist. Accordingly, States were limited in the extent to which they could develop control strategies adequate not only for attainment, but also for maintenance, of the national standards. Since the Environmental Protection Agency's capability of planning for continued maintenance of the national

standards is subject to the same limitations, and since State and local governments clearly should not lightly be deprived of the opportunity to plan and control growth in a manner best suited to the needs and preferences of individual communities and their inhabitants, with due consideration of environmental impacts, the Administrator, at this time, is not proposing substitute control strategies based on considerations related solely to maintenance of national standards. State are required, however, to prevent construction, modification, or operation of any stationary source at any location where its emissions will prevent the attainment or maintenance of a national standard; the Administrator will promulgate appropriate regulations wherever State plans are judged inadequate in this regard. Thus, all State plans will include this mechanism for minimizing the effects of growth on air quality. New source performance standards promulgated by the Administrator under section 111 of the Act will also serve to minimize the impact of growth. Furthermore, the Act authorized the Administrator to require revision of a State plan whenever he finds that it is substantially inadequate to attain or maintain a national standard. It is the Administrator's intention to make a continuing examination of the adequacy of State plans, and, where necessary, to call for revisions. States should be aware that failure to provide for maintenance of the national standards could necessitate restraints on population and industrial growth and/or further restrictions on emissions from existing sources of air pollution.

Evaluation of Control Strategies

A "control strategy" is a combination of measures designed to achieve the agregate reduction of emissions necessary for the purposes of attainment and maintenance of a national standard. The Administrator's regulations (40 CFR 51.13 and 51.14) set forth procedures, i.e., proportional or diffusion modeling, to be employed by the States in demonstrating that their control strategies will be adequate for these purposes. Evaluation of the control strategies generally included assessment of the accuracy of the data

relied upon by a State in demonstrating the adequacy of control strategies, the validity of any assumptions made by the State, and the accuracy of the calculations employed in the modeling exercises. In addition, a determination was made as to whether the control strategy would be sufficiently comprehensive.

Sulfur Oxides and Particulate Matter

The national standards for sulfur oxides and particulate matter include both short-term standards, e.g., maximum 24-hour concentrations not to be exceeded more than once per year, and long-term standards, i.e., annual average concentrations. State plans were required to set forth control strategies adequate for attainment and maintenance of both the short-term and long-term standards, with the exception of the 24-hour secondary standard for sulfur oxides and the annual average secondary standard for particulate matter, both of which are guidelines. Where State plans did not explicitly demonstrate that a control strategy is adequate for attainment and maintenance of short-term, as well as long-term standards, the Administrator has made judgments based on available data regard peak-to-mean ratios; point-source control measures, for example, are likely to reduce the frequency and intensity of peak concentrations, thus altering peak-to-mean ratios and increasing the likelihood that a control strategy adequate for attainment of an annual average standard will also be adequate for attainment of short-term standards.

Fuel Availability

The State implementation plans to control SO_x generally have been responsive to the mandates of the Clean Air Act. The plans provide for meeting by 1975 primary air quality standards which are designed to protect the public health. In most cases, the States determined 1975 to be the "reasonable time" allowed by the Act to meet the secondary air quality standards for SO_x which are designed to protect the public welfare. Fuel combustion regulations were designed to achieve both the primary and secondary standards by the

1975 date. In most States these emission regulations were made to apply statewide, without regard to the differing air quality in regions within the State.

It is clear that achieving these rigorous State standards in the time prescribed would significantly enhance air quality in many areas of the Nation, as contemplated by the Clean Air Act. However, in addition to reviewing the effectiveness of each State implementation plan, this Agency and the Federal government have an obligation to assess the impact of the various plans in aggregate. From the standpoint, there is strong evidence that the complete implementation of the plans as submitted may not be attainable in the time prescribed.

Because of physical limitations on our ability to clean the emissions of high sulfur fuels on a large scale in the time permitted by the statute, achievement of the particulars of the State plans would require the availability of large additional supplies of "clean" fuels—natural gas and low sulfur coal and oil. Since fuel desulfurization facilities are unlikely to be built on the scale which would be required to fully implement all State plans by 1975, it appears that all State plans can be completely implemented by 1975 only with a major short term shift to naturally clean fuels. Unfortunately, these naturally clean fuels are not likely to be available in quantities necessary to meet the projected demand.

Unfortunately, our long-overdue concern for air quality comes at a time when the abundance of cleaner energy fuels in the United States is rapidly disappearing and energy experts are becoming worried about our ability to meet our energy fuel needs even independent of environmental considerations. Given the limits on the supply of naturally clean fuels in the short run, the well publicized shortage of natural gas in this country, and the physically disruptive task of substituting the use of huge amounts of clean fuels by energy producers and users at a time when traditional fuels such as natural gas are in short supply, it is apparent that the Nation faces a difficult task.

It is also apparent that the cost of this effort, translated into costs of fuel and electric energy to our economy and to individual energy consumers, will be substantial and cannot be wholly ignored. On the other hand, appropriate environmental costs must be recognized in the price of energy if we are to allocate our total resources properly.

There are alternative strategies which should permit achievement of the goals of the Clean Air Act within the legislative deadlines, but the approach must be twofold. First, implementation of the standards must take into account the limits on total availability of clean fuels. Second, government must also address the problem of creating economic and other incentives which ensure that natural or desulfurized clean fuels go to users in areas of greatest environmental need.

The Pure Air Act of 1972 (the sulfur emission tax), which is currently before Congress, is important to both aspects of this approach. The tax would permit clean fuels to reach users in areas of environmental need by providing a strong economic incentive for those users to bid for the clean fuels. The tax would also increase the availability of clean fuels by providing an economic stimulus both to develop new clean fuel resources, and to perfect technology for cleaning fuels before combustion, and for purifying exhaust gases.

Preliminary analysis of EPA indicates the real possibility that, under current conditions in the domestic and world fuel markets including the absence of the sulfur tax, all aspects of the State Plans in the aggregate cannot be achieved by 1975 despite the best efforts of both government and the private sector. Pending further study, EPA is approving or promulgating regulations for meeting both the primary and secondary SO_x standards. The States should proceed to develop compliance schedules on the assumption that both standards can be met. In the meantime EPA will be completing its studies of the aggregate situation and will suggest necessary changes to the States, and likewise modify federally promulgated SO_x regulations for achievement of the secondary standard where appropriate. Highest priority

must be given to achieving the primary standards (health related) by the statutory deadline.

At this time, the States most likely to be affected by this shortage of clean fuels include Illinois, Indiana, Kentucky, Wisconsin, Michigan, Ohio, Tennessee, Alabama, Pennsylvania, West Virginia, Georgia, and New York, but others will also need to consider the availability of fuels in developing compliance schedules.

For its part in addition to completing this work, EPA intends to be vigorous in urging other Federal agencies and the Congress to adopt energy policies which will stimulate the availability of needed clean fuels and insure their availability to areas of greatest need, consistent with environment, national security consumer and other considerations.

Nitrogen Dioxide

Where attainment of the national standard for nitrogen dioxide would require additional emission reductions beyond those expected to result from Federal motor vehicle emission standards, the Administrator's regulations (40 CFR 51.14) required States to provide for the degree of nitrogen oxides emission reduction attainable through the application of reasonably available technology for the control of stationary source emissions of nitrogen oxides, as defined by 40 CFR Part 51, Appendix B. Hydrocarbon emission reductions arising from the Federal motor vehicle standards or from transportation control measures undertaken to implement the national standards for photochemical oxidants will tend to reduce ambient air concentrations of nitrogen dioxide. In accordance with 40 CFR 51.14, this combination of stationary and mobile source control measures is considered an adequate control strategy for implementation of the national standards for nitrogen dioxide. Studies aimed at providing and improved basis for developing and evaluating nitrogen oxides control strategies are underway. Based on the result of these studies, the Administrator will determine whether revision of the State plans for implementation of the national standards for nitrogen dioxide will be necessary; such revisions may necessitate, among other things the develop-

ment and application of nitrogen oxides emission control techniques going beyond those which are now available. Pending such action, States' requests for 2-year extensions of the deadline for attainment of this national standard have not been evaluated.

HYDROCARBONS

The national standard for hydrocarbons (40 CFR 50.10) is a guide to the formulation of control strategies for attainment and maintenance of the national standard for photochemical oxidants. Accordingly, State plans were not required to provide for attainment and maintenance of the national standard for hydrocarbons, per se.

TRANSPORTATION CONTROL MEASURES

The Act and the Administrator's regulations (40 CFR Part 51) require States to take steps to reduce emissions from transportation sources wherever such steps are necessary for attainment and maintenance of national ambient air quality standards. In August 1971, when the Administrator's regulations were promulgated, it was recognized that States have had practically no experience with transportation control measures as a means of dealing with air quality problems and that available data were not sufficient to permit States to develop meaningful transportation control schemes and predict their impact on air quality. The Environmental Protection Agency had already begun an assessment of the extent to which various transportation control measures, including motor vehicle inspection and installation of emission control devices on in-use automobiles, could be expected to produce improvements in air quality, but it was apparent that the results would not be available within the time allowed for development of State plans. Accordingly, the States were advised that adoption of transportation control schemes could be deferred beyond the statutory deadline for submittal of implementation plans but that State plans would have to define the degree of emission reduction to be achieved through transportation control measures and identify the measures being considered. States were further advised that

they would have to submit not later than February 15, 1973, together with their first semiannual progress reports, definitive transportation control plans, including identification of the specific measures to be implemented, demonstration of the adequacy of these measures for attainment and maintenance of the national standards, and a detailed timetable for obtaining any necessary legal authority and taking all other steps necessary to implement the various measures. The Environmental Protection Agency, in cooperation with the Department of Transportation, will provide assistance to the States in the development of their transportation control plans.

Compliance Schedules

State plans were required to specify the dates by which all sources must be in compliance with applicable regulations, except that, where a State plan provides for negotiating compliance schedules for individual sources, such schedules are required to be submitted to the Administrator no later than the time of submittal of the State's first semiannual progress report. States generally have either prescribed a terminal date for compliance by all sources, with individual source schedules, including schedules of incremental steps toward compliance, to be negotiated, or have made regulations effective almost immediately, with compliance schedules to be negotiated and effectuated through a variance procedure. Either approach is considered acceptable: *Provided, first,* that compliance with all regulations related to attainment of national ambient air quality standards will be achieved by the attainment date specified in the State plan or prescribed by the Administrator, and second, that provision is made for negotiating compliance schedules, including incremental steps in cases where the terminal date is more than 18 months away.

Emergency Episodes

State plans were required to set forth episode criteria, i.e., pollutant concentrations at which specified emission control actions will be initiated in order to prevent significant harm

to the health of persons. Episode criteria were required to be adequate to protect against occurrence of the significant harm levels prescribed by the Administrator (40 CFR 51.16). Emission control action plans were required to provide for abatement action dealing with area sources, e.g., open burning, commercial and residential incinerators, and motor vehicles, and to provide for development of individual standby abatement plans for all stationary sources emitting 100 tons per year or more. Where episode criteria and/or emission control action plans applicable to area sources and motor vehicles were not submitted or were disapproved, the Administrator is not prescribing substitute provisions, but, rather, in carrying out his responsibilities under section 303 of the Act, will be guided by the suggested episode criteria and emission control action plans set forth in the Administrator's regulations (40 CFR Part 51, Appendix L). Where episode criteria and/or emission control action plans are approved, the Administrator will make use of them in the event that it is necessary to initiate action under section 303. In either case, the Administrator, in acting under section 303, may also take into consideration other relevant information and advice, including medical-scientific opinions on endangerment to the health of persons. When a State plan fails to provide for public announcements of episode stages or fails to provide for development of standby abatement plans for stationary sources emitting 100 tons per year or more, the Administrator will promulgate regulations to correct such deficiencies.

Air Quality Surveillance

Where a State's provisions for air quality surveillance do not meet the requirements of the Administrator's regulations (40 CFR 51.17), the deficiencies will be identified in the evaluation report, and the Environmental Protection Agency will work with the State in correcting the deficiencies. Insofar as air quality monitoring methods are concerned, the only methods currently approved are the reference methods prescribed by the Administrator (40 CFR Part 50) simultaneously with a promulgation of the national standards. With

respect to carbon monoxide, photo-chemical oxidants, and hydrocarbons, the Administrator prescribed an analytical principle; any method employing exactly the same analytical principle is considered a reference method, provided that it meets the performance specifications set forth in the Administrator's regulations (40 CFR 51.17). For all pollutants, methods other than the reference methods prescribed by the Administrator may be approved if they are shown to be equivalent to the reference methods. Equivalency testing guidelines are being developed by the Environmental Protection Agency.

New Sources and Modifications

State plans were required to provide for review of new sources and modifications of existing sources and for preventing construction or modification if it would result in violations of applicable portions of a control strategy or interfere with attainment or maintenance of national standards.

Resources

States were required by section 110 of the Act to provide assurances that they will have adequate resources, i.e., personnel and funding, to carry out their implementation plans. The Administrator's judgment as to the probable adequacy of projected resources is based on a number of considerations, including estimates of manpower needs in relation to factors affecting the nature and magnitude of air pollution problems and previous evaluations of the performance of State and local air pollution control agencies. Where it is the Administrator's judgment that a State's projected resources may be inadequate, the Environmental Protection Agency will work with the State in correcting this deficiency. The Administrator's judgment on the adequacy of resources should not be construed as a commitment to provide financial support; such support is subject to the limitations of funds appropriated under the Clean Air Act.

Two-Year Extensions

The Act provides for 2-year, or shorter, extensions of the statutory deadline for attainment of national primary ambient air quality standards where needed technology or other alternatives are not available or will not be available soon enough to permit attainment of the primary standards within the 3-year period prescribed by the Act. For the most part, States' requests for such extensions were related to identified needs for application of transportation control measures. The Administrator has determined that the leadtime necessary for development, adoption, and implementation of transortation control measures generally precludes their application on any significant scale within the next 3 years, i.e., they will not be available soon enough to permit attainment of the primary standards within the time period prescribed by the Act. This determination was reflected in 40 CFR 51, in which emission control measures applicable to mobile sources, with minor exceptions, were not included among the various emission control measures judged to be attainable with reasonably available technology. Accordingly, it is the Administrator's judgment that 2-year extensions are justified in cases where transportation control measures will be necessary. It should be emphasized, however, that timetables for attainment of primary standards will be subject to continuing examination, and, where the Administrator finds that more expeditious attainment is practicable, States will be required to revise their timetables.

Where States have submitted implementation plans that do not provide for attainment of the primary standards within the 3-year period prescribed by the Act and have not requested an extension, the Administrator has evaluated such State plans to determine whether an extension is justified under the provisions of the Act. The Administrator's determinations in such cases are reflected below; these determinations will also be subject to continuing examination, and where necessary, revision.

Eighteen-Month Extensions

Under the Act, the Administrator may, wherever he determines necessary, extend for a period of not more than

18 months the deadline for submittal of a State plan or portion thereof which would implement a national secondary standard. 40 CFR 51.31 provides that such extensions may be granted where attainment of a secondary standard will require emission reductions exceeding those which can be achieved through the application of reasonably available control technology, as defined in 40 CFR Part 51, Appendix B. Where a State plan fails to provide for attainment of a secondary standard, and where attainment would require emission reductions exceeding those which can be achieved through the application of reasonably available control technology, the Administrator is providing for an 18-month extension regardless of whether the State has requested one. Such extensions will be applicable to adoption in an adequate plan for implementation of the secondary standard by the State or promulgation of an adequate implementation plan by the Administrator.

Emission Data Availability

The Act requires assurance that States will provide for public availability of emission data. Where a State lacks legal authority to obtain and/or release emission data or where the State plan is deficient with respect to source-reporting requirements or procedures for public access to emission data, the Administrator is disapproving the pertinent provisions of the State plan. The Administrator will promulgate regulations to remedy such deficiencies. Under section 114 of the Clean Air Act, States may request delegation of the Administrator's authority to obtain and release information.

Source Monitoring

States must have legal authority to require stationary source owners or operators to install, maintain, and use emission monitoring devices. The Environmental Protection Agency is making an analysis of the performance of currently available emission (in-stack) monitoring devices. Accordingly, States were not required by 40 CFR Part 51 to impose specific source-by-source requirements for in-stack monitoring at this time.

Optional Control

Several State plans include regulations under which a source owner or operator could be exempt from compliance with an applicable emission limitation if he can show that emissions from the source will not interfere with attainment or maintenance of the national standards. The Administrator neither approves nor disapproves such optional control features. States are advised, however, that action taken to allow any such exemptions will constitute revision of a State plan and therefore will be subject at that time to the Administrator's approval.

Revisions

In accordance with the Act and the Administrator's regulations (40 CFR 51.6), all State plans are subject to revision, as necessary, to take account of revisions of the national standards, availability of improved or more expeditious methods of attaining the national standards, or a finding by the Administrator that a State plan is substantially inadequate to attain or maintain a national standard. Accordingly, whether a State has acknowledged that its implementation plan is subject to revision is considered immaterial.

Enforcement

Upon approval by the Administrator, a State plan is enforceable by the Administrator under the Clean Air Act. All approved provisions relating to attainment and maintenance of national standards, including approved rules and regulations, are subject to such enforcement action. Where a State plan includes regulations designed to attain and maintain air quality better than that required by the national standards, such regulations are subject to enforcement action under the Clean Air Act unless they are separate from those necessary for attainment and maintenance of the national standards.

Progress Reports

States are required to submit semiannual reports on their progress in carrying out approved implementation plans or

portions thereof. For implementation plans approved herein, the first progress reports will be due February 15, 1973. A format for use in preparing and submitting such reports is being prepared and will be made available to the States.

Previous Approvals

The State implementation plans approved herein supplement the portions previously approved by the Administrator, notice of which was published February 3, 1972 (37 F.R. 2581), at Part 52 of Title 40 of the Code of Federal Regulations. Portions of State plans which have previously been approved remain in effect and unaffected by the approvals published today.

Scope of Approvals

In general, all portions of State plans which are related to attainment and maintenance of national standards are approved unless specifically disapproved herein.

Judicial Review

The Administrator's approval or promulgation of implementation plans, or portions thereof, is subject to judicial review under section 307(b)(1) of the Clean Air Act. For purposes of section 307(b)(1), the 30-day period within which a petition for review may be filed will be considered to run from the date of publication in the Federal Register of a notice of approval or promulgation of a plan or portion thereof.

Note

Subpart A of the regulations includes general statements regarding the type of provisions which will be promulgated by the Agency as necessary in various subparts. These statements are expressed in the present tense in order to avoid revisions of verb tenses at the time of promulgation.

Effective Date

These regulations are effective on the date of their publication in the Federal Register (5-31-72). The Agency

finds that good cause exists for not publishing these regulations as a notice of proposed rule making and for making them effective immediately upon publication, for the following reasons:

1. The implementation plans were prepared, adopted, and submitted by the States, and reviewed and evaluated by the Administrator pursuant to 40 CFR Part 51, which, prior to promulgation, had been published as a notice of proposed rule-making for comment by interested persons, and

2. The approved implementation plan provisions were adopted in accordance with procedural requirements of State and Federal law, which provided for adequate public participation through notice, public hearings, and time for comment, and consequently further public participation is unnecessary.

(42 U.S.C. 1857c-5)

Dated: May 26, 1972.

WILLIAM D. RUCKELSHAUS,
Administrator.

NOTE: Incorporation by reference provisions approved by the Director of the Federal Register on May 18, 1972.

Part 52 of Chapter I of Title 40 of the Code of Federal Regulations is amended by redesignating existing § 52.1 as new Subpart EEE, § 52.2850 and by adding new Subparts A-DDD as follows:

Subpart A—General Provisions

§ 52.01 Definitions.

All terms used in this part but not defined herein shall have the meaning given them in the Clean Air Act and in Part 51 of this chapter.

§ 52.02 Introduction.

(a) This part sets forth the Administrator's approval and disapproval of State plans and the Administrator's promulgation of such plans or portions thereof. Approval of a plan or any portion thereof is based upon a determination by the Administrator that such plan or portion meets the require-

ments of section 110 of the Act and the provisions of Part 51 of this chapter.

(b) Any plan or portion thereof promulgated by the Administrator substitutes for a State plan or portion thereof disapproved by the Administrator or not submitted by a State, or supplements a State plan or portion thereof. The promulgated provisions, together with any portions of a State plan approved by the Administrator, constitute the applicable plan for purposes of the Act.

(c) Where nonregulatory provisions of a plan are disapproved, the disapproval is noted in this part and a detailed evaluation is provided to the State, but no substitute provisions are promulgated by the Administrator.

(d) All approved regulatory provisions of each plan are incorporated by reference in this part. Regulatory provisions of a plan approved or promulgated by the Administrator are enforceable by the Administrator and the State, and by local agencies in accordance with their assigned responsibilities under the plan.

(e) Each State's plan is dealt with in a separate subpart, which includes an introductory section identifying the plan by name and the date of its submittal, a section classifying regions, and a section setting forth dates for attainment of the national standards. Additional sections are included as necessary to specifically identify disapproved provisions, to set forth reasons for disapproval, and to set forth provisions of the plan promulgated by the Administrator.

(f) Revisions to applicable plans will be included in this part when approved or promulgated by the Administrator.

§ 52.03 Extensions.

Each subpart includes the Administrator's determination with respect to any request under section 110(b) of the Act for an extension of the deadline for submitting that portion of a plan which implements a secondary standard or any request under section 110(e) of the Act for an extension of the 3-year deadline for attainment of a primary standard.

§ 52.04 Classification of regions.

Each subpart sets forth the priority classification, by pollutant, for each region in the State. Each plan for each region was evaluated according to the requirements of Part 51 of this chapter applicable to regions of that priority.

§ 52.05 Public availability of emission data.

Each subpart sets forth the Administrator's disapproval of plan procedures for making emission data available to the public after correlation with applicable emission limitations, and includes the promulgation of requirements that sources report emission data to the Administrator for correlation and public disclosure.

§ 52.06 Legal authority.

(a) The Administrator's determination of the absence or inadequacy of legal authority required to be included in the plan is set forth in each subpart. This includes the legal authority of local agencies and State governmental agencies other than an air pollution control agency if such other agencies are assigned responsibility for carrying out a plan or portion thereof.

(b) No legal authority as such is promulgated by the Administrator. Where required regulatory provisions are not included in the plan by the State because of inadequate legal authority, substitute provisions are promulgated by the Administrator.

(c) Where a State plan did not clearly set forth a timetable for obtaining legal authority to establish transportation and land-use controls necessary to attain or maintain the national standards, the subpart sets forth a timetable for the acquisition of such authority and the adoption of the necessary control measures. The State's failure to comply with the timetable set forth in the subpart will be grounds for promulgation of the required measures by the Administrator.

§ 52.07 Control strategies

(a) Each subpart specifies in what respects the control strategies are approved or disapproved, and also specifies the

date by which an approved or promulgated control strategy will result in the attainment of the pertinent national standards.

(b) A control strategy may be disapproved as inadequate because it is not sufficiently comprehensive, although all regulations provided to carry out the strategy may themselves be approved. In this case, regulations for carrying out necessary additional measures are promulgated in the subpart.

(c) Where a control strategy is adequate to attain and maintain a national standard but one or more of the regulations to carry it out is not adopted or not enforceable by the State, the control strategy is approved and the necessary regulations are promulgated by the Administrator.

(d) Where a control strategy is adequate to attain and maintain air quality better than that provided for by a national standard but one or more of the regulations to carry it out is not adopted or not enforceable by the State, the control strategy is approved and substitute regulations necessary to attain and maintain the national standard are promulgated.

§ 52.08 Rules and regulations.

Each subpart identifies the regulations, including emission limitations, which are disapproved by the Administrator, and includes the regulations which the Administrator promulgates.

§ 52.09 Compliance schedules.

(a) In each subpart, compliance schedules disapproved by the Administrator are identified, and compliance schedules promulgated by the Administrator are set forth.

(b) Individual source compliance schedules submitted with certain plans have not yet been evaluated, and are not approved or disapproved.

§ 52.10 Review of new sources and modifications.

In any plan where the review procedure for new sources and source modifications does not meet the requirements of § 51.18 of this chapter, provisions are promulgated which

enable the Administrator to obtain the necessary information and to prevent construction or modification.

§ 52.11 Prevention of air pollution emergency episodes.

(a) Each subpart identifies portions of the air pollution emergency episode contingency plan which are disapproved, and sets forth the Administrator's promulgation of substitute provisions.

(b) No provisions are promulgated to replace any disapproved air quality monitoring or communications portions of a contingency plan, but detailed critiques of such portions are provided to the State.

§ 52.12 Source surveillance.

(a) Each subpart identifies the plan provisions for source surveillance which are disapproved, and sets forth the Administrator's promulgation of necessary provisions for requiring sources to maintain records, make reports, and submit information.

(b) No provisions are promulgated for any disapproved State or local agency procedures for testing, inspection, investigation, or detection, but detailed critiques of such portions are provided to the State.

(c) For purposes of Federal enforcement, emissions from sources subject to provisions of a plan which did not specify attest procedure or subject to provisions promulgated by the Administrator will be tested by means of the procedures and methods prescribed in the appendix to Part 60 of this title, and emissions from sources subject to approved provisions of a plan wherein a test procedure was specified will be tested by the specified procedure.

§ 52.13 Air quality surveillance; resources; intergovernmental cooperations.

Disapproved portions of the plan related to the air quality surveillance system, resources, and intergovernmental cooperation are identified in each subpart, and detailed critiques of such portions are provided to the State. No provisions are promulgated by the Administrator.

§ 52.14 State ambient air quality standards.

Any ambient air quality standard submitted with a plan which is less stringent than a national standard is not considered part of the plan.

§ 52.15 Public availability of plans.

Each State shall make available for public inspection at least one copy of the plan in at least one city in each region to which such plan is applicable. All such copies shall be kept current.

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Subpart P—Indiana

§ 52.770 Identification of plan.

(a) Title of Plan: "State of Indiana Air Pollution Control Implementation Plan."

(b) The plan was officially submitted on January 31, 1972.

(c) Supplemental information was submitted on:

(1) March 16, 1972, by the Indiana Air Pollution Control Board, and

(2) April 11, May 1 and 16, 1972.

§ 52.771 Classification of regions.

The Indiana plan was evaluated on the basis of the following classifications:

	Pollutant				
Air quality control region	Particulate matter	Sulfur oxides	Nitrogen dioxide	Carbon monoxide	Photochemical oxidants (hydrocarbons)
East Central Indiana Intrastate	II	II	III	III	III
Evansville (Indiana)—Owensboro-Henderson (Kentucky) Interstate	I	II	III	III	III
Louisville Interstate	I	I	I	III	I
Metropolitan Chicago Interstate (Indiana-Illinois)	I	I	I	I	I
Metropolitan Cincinnati Interstate	I	II	I	III	I
Metropolitan Indianapolis Intrastate	I	I	I	I	I
Northeast Indiana Intrastate	II	III	III	III	III
South Bend-Elkhart (Indiana)—Benton Harbor (Michigan)	I	IA	III	III	III
Southern Indiana Intrastate	IA	IA	III	III	III
Wabash Valley Intrastate	I	I	III	III	III

§ 52.772 Extensions.

(a) The Administrator hereby extends for 18 months the statutory timetable for submission of Indiana's plan for attainment and maintenance of the secondary standards for sulfur oxides and particulate matter in the Indiana portion of the Metropolitan Chicago Interstate Region and for 9 months for sulfur oxides in the Metropolitan Indianapolis Intrastate Region.

(b) The Administrator hereby extends for 2 years the attainment date for the national standards for carbon monoxide and photochemical oxidants in the Metropolitan Indianapolis Intrastate Region.

§ 52.773 Approval status.

With the exceptions set forth in this subpart, the Administrator approves Indiana's plan for attainment and maintenance of the national standards.

§ 52.774 General requirements.

(a) The requirements of § 51.10(e) of this chapter are not met since the plan does not provide for public availability of emission data.

§ 52.775 Legal authority.

(a) The requirements of § 51.11(f) of this chapter are not met since the following deficiencies exist in the local agency legal authority:

(1) East Chicago:

(i) Authority to require recordkeeping is inadequate (§ 51.11(a)(5) of this chapter).

(ii) Authority to require installation of monitoring devices is inadequate (§ 51.11(a)(6) of this chapter).

(2) Evansville:

(i) Authority to prevent construction, modification, or operation of any stationary source at any location where emissions from such source will prevent the attainment or maintenance of a national standard is inadequate (§ 51.11(a)(4) of this chapter).

(ii) Authority to require recordkeeping is inadequate (§ 51.11(a)(5) of this chapter).

(iii) Authority to require installation of monitoring devices is inadequate (§ 51.11(a)(6) of this chapter).

(3) Gary:

(i) Authority to require recordkeeping is inadequate (§ 51.11(a)(5) of this chapter).

(ii) Authority to require installation of monitoring devices is inadequate (§ 51.11(a)(6) of this chapter).

(4) Hammond:

(i) Authority to require recordkeeping is inadequate (§ 51.11(a)(5) of this chapter).

(ii) Authority to require installation of monitoring devices is inadequate (§ 51.11(a)(6) of this chapter).

(5) Indianapolis:

(i) Authority to require recordkeeping is inadequate (§ 51.11(a)(5) of this chapter).

(ii) Authority to require installation of monitoring devices is inadequate (§ 51.11(a)(6) of this chapter).

(6) Michigan City:

(i) Authority to require recordkeeping is inadequate (§ 51.11(a)(5) of this chapter).

(ii) Authority to require installation of monitoring devices is inadequate (§ 51.11(a)(6) of this chapter).

(7) Wayne County:

(i) Authority to require recordkeeping and to make inspections and conduct tests of air pollution sources in inadequate (§ 51.11(a)(5) of this chapter).

(ii) Authority to require installation of monitoring devices is inadequate (§ 51.11(a)(6) of this chapter).

(iii) Authority to prevent construction, modification, or operation of any stationary source at any location where emissions from such source will prevent the attainment or maintenance of a national standard is inadequate (§ 51.11(a)(4) of this chapter).

(8) Lake County:

(i) Authority to require installation of monitoring devices is inadequate (§ 51.11(a)(6) of this chapter).

(ii) Authority to prevent construction, modification, or operation of any stationary source at any location where emissions from such source will prevent the attainment or maintenance of a national standard is inadequate (§ 51.11(a)(4) of this chapter.

(9) St. Joseph County:

(i) Authority to prevent construction, modification, or operation of any stationary source at any location where emissions from such source will prevent the attainment or maintenance of a national standard is inadequate (§ 51.11(a)(4) of this chapter).

(ii) Authority to require recordkeeping is inadequate (§ 51.11(a)(5) of this chapter).

(iii) Authority to require installation of monitoring devices is inadequate (§ 5.11 (a)(6) of this chapter).

(10) Vigo County:

(i) Authority to require recordkeeping is inadequate (§ 51.11(a)(5) of this chapter).

(ii) Authority to require installation of monitoring devices is inadequate (§ 51.11(a)(6) of this chapter).

(iii) Authority to prevent construction, modification, or operation of any stationary source at any location where emissions from such source will prevent the attainment or maintenance of a national standard is inadequate (§ 51.11(a)(4) of this chapter).

(11) Anderson County:

(i) Authority to require installation of monitoring devices is inadequate (§ 51.11(a)(6) of this chapter).

§ 52.776 Control strategy: Particulate matter.

(a) The requirements of § 51.13 of this chapter are not met since the plan does not provide for attainment and maintenance of the national standards for particulate matter in the Metropolitan Indianapolis Intrastate Region.

(b) APC-4 of Indiana's "Air Pollution Control Regulations" (emission limitation for particulate matter from fuel, combustion sources), which is a part of the particulate matter control strategy, is disapproved for the Metropolitan Indianapolis Intrastate Region.

§ 52.777 Control strategy: Photochemical oxidants (hydrocarbons).

(a) The requirements of § 51.14 of this chapter are not met since the plan does not provide for attainment and maintenance of the national standard for photochemical oxidants in the Metropolitan Indianapolis Intrastate Region.

§ 52.778 Compliance schedules

(a) The requirements of § 51.15(c) of this chapter are not met since the compliance schedules for sources of carbon monoxide, nitrogen dioxide, and hydrocarbons extend over a period of more than 18 months and periodic increments of progress are not included.

(b) The requirements of § § 51.15(a)(1) and 5.22 of this chapter are not met since legally enforceable compliance schedules for sources of sulfur oxides are not set forth in the plan.

§ 52.779 Air quality surveillance.

(a) The requirements of § 51.17(b)(1) of this chapter are not met since the plan does not provide sufficient detail on the basis for the design of the air quality surveillance system.

(b) The requirements of § 51.17(b)(4) of this chapter are not met since the plan does not give any indication of the existence of the necessary laboratory analytical capability.

(c) The requirement § 51.17(b)(5) of this chapter are not met since the plan contains an incomplete description of the air quality data handling and analysis procedures.

(d) The requirements of § 51.17(c) of this chapter are not met since the monitoring stations selected for use during any air pollution emergency episode stage are not to be in operation within 1 year after the date of the Administrator's approval of the plan.

§ 52.780 Review of new sources and modifications

(a) The requirements of § 51.18(a) of this chapter are not met since the plan does not contain adequate procedures to enable the State to determine whether construction or modification of stationary sources will result in violations of applicable portions of the control strategy and APC-1 of Indiana's "Air Pollution Control Regulations" is disapproved.

(b) The requirements of § 51.18(c) of this chapter are not met since the plan does not have legally enforceable procedures that include a means of disapproving construction or modification of stationary sources.

(c) The requirements of § 51.18(d) of this chapter are not met since the plan does not indicate that approval of any construction or modification shall not affect the responsibility of the owner or operator of a source to comply with applicable portions of the control strategy.

§ 51.781 Rules and regulations

(a) The requirements of § 51.22 of this chapter are not met since the emission limitations for fuel combustion sources, which are necessary for attainment and maintenance of the primary standards for particulate matter in the Indiana portion of the Metropolitan Chicago Interstate Region, have not been adopted and are not enforceable by the State agency.

(b) A part of the second sentence in section 2, APC-15; section 1, APC-16; and section 3, APC-17, which states: "Where there is a violation or potential violation of ambient air quality standards, existing emission sources or any existing air pollution control equipment shall comply with this regulation * * *", is disapproved since it makes the regulations unenforceable by the State agency.

(c) A part of the third sentence of section 3(1), APC-13, which states: "* * * or a combination of fuels for averaging emissions may be used to comply with this regulation", is disapproved since it makes the regulation unenforceable by the State agency.

(d) The first two sentences of section 4, APC-13, which state: "For existing sources, the Board shall require corrective action when sulfur dioxide emissions contribute to a violation of the Ambient Air Quality Standards. When the Board designates a region as not meeting the Ambient Air Quality Standards, it has the authority to require all sources in that region to comply with the provisions of this regulation.", are disapproved since they make the regulation unenforcable by the State agency.

§ 52.782 Request for 18-month extension.

(a) The requirements of § 51.31 of this chapter are not met since the request for an 18-month extension for submitting that portion of the plan that implements the secondary standards for particulate matter in the Metropolitan Indianapolis Intrastate Region does not show that attainment of the secondary standards will require emission reductions exceeding those which can be achieved through the application of reasonably available control technology.

§ 52.783 Attainment dates for national standards

The following table presents the latest dates by which the national standards are to be attained. These dates reflect the information presented in Indiana's plan, except where noted.

Air quality control region	Pollutant						
	Particulate matter		Sulfur oxides		Nitrogen dioxide	Carbon monoxide	Photochemical oxidants (hydrocarbons)
	Primary	Secondary	Primary	Secondary			
East Central Indiana Inrastate	a	a	a	a	e	e	e
Evansville (Indiana)-Owensboro-Henderson (Kentucky) Interstate	a	a	d	a	e	e	e
Louisville Interstate	a	a	a	a	a	a	a
Metropolitan Chicago Interstate (Indiana-Illinois)	a	c	a	c	a	a	a
Metropolitan Cincinnati Interstate	a	a	d	a	a	a	a
Metropolitan Indianapolis Intrastate	a	a	a	f	a	b	b
Northeast Indiana Intrastate	a	a	e	e	e	e	e
South Bend-Elkhart (Indiana)-Benton Harbor (Michigan) Interstate	a	a	a	a	e	e	e
Southern Indiana Intrastate	a	a	a	a	e	e	e
Wabash Valley Intrastate	a	a	a	a	e	e	e

NOTE.—Footnotes which are underlined are proposed by the Administrator because the plan did not provide a specific date or the date provided was not acceptable.

a. Three years from plan approval or promulgation.

b. Five years from plan approval or promulgation.

c. Eighteen-month extension granted.

d. Air quality levels presently below the primary standards.

e. Air quality levels presently below the secondary standards.

f. Nine-month extension granted.

40 Fed. Reg. 19, 210-11 (1975)

ENVIRONMENTAL PROTECTION AGENCY

[FRL 368-2]

[40 CFR Part 52]

INDIANA

Approval and Promulgation of State Implementation Plans

Section 110 of the Clean Air Act, as amended, and the implementing regulations in 40 CFR Part 51 require each State to submit to the Administrator any revisions to the State Implementation Plan which may affect the attainment and maintenance of any of the National Ambient Air Quality Standards. On January 31, 1972, the State of Indiana submitted an implementation plan to achieve the National Ambient Air Quality Standards. The plan was approved by the Administrator on May 31, 1972 (37 FR 10842) with several exceptions. These exceptions included the disapproval of portions of various Air Pollution Control Regulations (APC), specifically APC-13 a sulfur dioxide emission limitation regulation, APC-15 a hydrocarbon control regulation, APC-16 carbon monoxide control regulation, and APC-17 a nitrogen oxide control regulation. These regulations were disapproved as being non-responsive to EPA requirements set forth at 40 CFR 51.15 and 51.22. Subsequently the State submitted amended version of APC-13, APC-15, and APC-16 which the Administrator approved on May 14, 1973 (38 FR 12698).

Subsequent to publication of notice and public hearing the Indiana Air Pollution Control Board adopted regulations APC-3, APC-13, APC-15, APC-16, APC-17, APC-18, APC-20, and APC-22. The Environmental Management Board approved the regulations and after review by the State Attorney General, the regulations were signed by the Governor. On March 7, 1974, the Technical Secretary of the Indiana Air Pollution Control Board, acting for the Governor of Indiana, submitted to the Region V Administrator new regulations APC-18, and APC-20. On October 3, 1974, the Technical Secretary submitted revised regulations APC-16, APC-17, and new regulation APC-22. On November 8, 1974,

the Technical Secretary submitted revised regulations APC-3, and APC-15, and on December 5, 1974, the Technical Secretary submitted a revised APC-13.

The proposed revisions to the Indiana implementation plan are more fully described below:

APC-3 regulates control of visible emissions and malfunctions of stationary sources and is amended in its entirety. A visible emissions standard for stationary sources is included in the regulation (amended). Temporary exemptions from compliance are permitted for starting a fire, or blowing boiler tubes for reasonable periods of time. Such exemptions must be individually requested from the Indiana Air Pollution Control Board (amended). The violation of the opacity standard shall be considered prima-facie evidence of a violation of any applicable particulate control regulation which may be refuted by a stack test. The regulation defines malfunctions and outlines a reporting procedure to be followed by a source in the event of a malfunction. In addition, facilities having emissions in excess of 2000 pounds per hour following a malfunction are required to develop a malfunction emission reduction program (new). Finally, the regulation requires all new sources to comply with applicable portions of the Federal New Source Performance Standards, 40 CFR Part 60 (new).

APC-13 regulates control of sulfur dioxide emissions from stationary sources. The regulation distinguished new large sources, new small sources and all existing sources to which various parts of the regulation apply (new). Basis stack construction provisions are defined (amended). Maximum total sulfur dioxide emissions are specified in terms of heat input for combustion sources and process weight input for process sources (amended). Application of emission limitations depends upon the priority classification of the air quality basins defined by APC-22 (new). Compliance schedules are identified for the various control requirements (new). A currently approved provision requiring more stringent control where ambient air standards are not attained has been deleted in the revised APC-13. It also appears that previously

exempted residential dwellings must now comply with APC-13, at least in Priority "A" Basins.

APC-15 regulates control of hydrocarbon emissions from stationary sources. Applicable emission limitations depend upon the priority classification of the air quality basin as defined by APC-22 (new). The Air Pollution Control Board retains broad discretion to determine the adequacy of systems for the control of emissions of hydrocarbons (amended). The regulation also exempts certain sources of emissions and certain hydrocarbons and classes of hydrocarbons from the control required by this regulation (amended).

APC-16 regulates control of carbon monoxide emissions from new stationary sources. Application of the emission limitations depends upon the priority classification of the air quality basin defined by APC-22 (new). Provisions affecting petroleum refining, ferrous metal smelters, and refuse incineration and burning equipment, contained in the currently approved APC-16 have been omitted for existing sources throughout the State. This proposed regulation is less restrictive than the currently approved APC-16 which requires controls of existing sources.

APC-17 regulates control of nitrogen oxide emissions from new stationary sources. Application of the regulation depends upon the priority classification of the air quality basin as defined by APC-22 (new). The amended regulation does not require control of nitrogen oxide emissions from existing sources as does the approved regulation.

APC-18 is a new regulation establishing timetables of compliance with regulation APC-4R, 5, 6, and 7 for existing sources of particulate matter emissions. Categorical compliance schedules are included for fuel combustion sources with a final compliance date for fuel shifting of April 1, 1974; a final date for installation of controls on boilers of 300 million BTU's or less by April 1, 1975; and a final date for installation of controls on boilers of greater than 300 million BTU's by May 31, 1975. Final compliance must be achieved by October 15, 1974 for all existing feed and grain mills, stone quarries and stone processing facilities; by January 1, 1975 for all

existing glass manufacturing; by October 1, 1974 for all existing brick and clay product manufacturers; by October 15, 1974 for all existing mineral wool producers; by October 1, 1974 for all wood working industries; by September 1, 1974 for all existing fertilizer manufacturers; and by January 1, 1975 for all sources not explicitly mentioned in this regulation.

APC-20 is a new regulation concerning the generation of fugitive dust from activities of industrial, commercial, governmental, private, and other operations within the State of Indiana. The regulation defines fugitive dust as particulate matter which escapes beyond the property line or boundaries on which the source is located. The regulation also defines respirable dust as particulate matter in the size range of 0.5 microns to 6.0 microns in diameter. A source is considered in violation of this regulation if the number of particles of fugitive dust measured at a downwind receptor increase the background concentration by 67%. This resulting percentage of increased concentration is modified by an examination of the potential respiratory damage which may be caused by the emissions from the source. The regulation also contains a detailed discussion of applicablility, mobile fugitive dust sources, methods of measurement, and of exceptions to the regulation. The final compliance date for all sources subject to APC—20 is July 1, 1974.

APC—22 is a new regulation establishing pollutant priority classifications (A, B, and C) by geographical areas (counties) for Set I and Set II pollutants from stationary sources. Basin priorities A, B, and C are defined, and priority ratings for each pollutant in each county in Indiana are specified. As defined in APC—22, basin priority "A" identifies any area of land (county) wherein the ambient air concentration for a specific contaminant or pollutant is equal to or in excess of the primary air quality standard. Basin priority "B" describes any area of land (county) wherein the ambient air concentration for a specific contaminant or pollutant is equal to or in excess of the secondary air quality standard. Basin priority "C" identifies any area of land (county) wherein ambient air concentration for a specific contaminant or pollutant is less

than the secondary air quality standard. Control of emissions is not required of existing stationary sources of hydrocarbons, carbon monoxide, and nitrogen oxide in counties classified as priority "C". A source of sulfur dioxide emissions located within a county classified as "C" is only required to maintain a supply of low sulfur coal to be used during periods of air stagnation. Sulfur dioxide emission reductions by use of best available control technology are not required by sources in areas classified as "C".

While preliminary analysis of the supporting data submitted by the State would indicate the data will be substantially inadequate to support APC—22 as a change to the implementation plan, EPA in furtherance of the Clean Fuels Policy outlined in the Energy Supply and Environmental Coordination Act of 1974 has reviewed the sulfur dioxide classifications in the light of available air quality and emission data in conjunction with modeling analyses and has determined the following classification of counties to be approvable on a preliminary basis:

Adams
Allen
Bartholomew
Benton
Blackford
Boone
Brown
Carroll
Cass
Clark
Clay
Clinton
Crawford
Daviess
Decatur
De Kalb
Delaware
Dubois
Elkhart
Fayette
Fountain
Franklin
Fulton
Gibson
Grant
Greene
Hamilton
Hancock
Harrison
Hendricks
Henry
Howard
Huntington
Jackson
Jasper
Jay
Jennings
Johnson
Knox
Kosciusko

Lagrange
Lake
Lawrence
Madison
Marshall
Martin
Miami
Monroe
Montgomery
Morgan
Newton
Noble
Ohio
Orange
Owen
Parke
Perry
Posey
Pulaski
Putnam
Randolph
Ripley
Rush
St. Joseph
Scott
Shelby
Spencer
Starke
Steuben
Switzerland
Tippecanoe
Tipton
Union
Vanderburgh
Wabash
Warren
Washington
Wayne
Wells
White
Whitley

Similarly, the priority designations have been preliminarily determined not to be approvable in the following counties:

Dearborn
Floyd
Jefferson
La Porte
Marion
Pike
Porter
Sullivan
Vermillion
Vigo
Warrick

A copy of the proposed regulatory revisions to the Indiana air implementation plan together with supporting documentation from the State and a copy of the preliminary analysis of APC—22 by EPA are available for public inspection at the Environmental Protection Agency, Freedom of Information Center, 401 M Street, SW., Washington, D.C., at the Agency Region V Office, 230 South Dearborn Street, Chicago, Illinois and at the Indiana State Board of Health, Division of Air Pollution Control, 2150 Lafayette Road, Indianapolis, Indiana.

Interested persons may comment on the notice by submitting all remarks in writing to the Regional Administrator, Environmental Protection Agency, Region V, 230 South Dearborn Street, Chicago, Illinois 60604, comments must be received no later than thirty days from the date of this notice, to be eligible for consideration. All comments will be available for public inspection at the above address during business hours. The agency will carefully weigh all comments submitted and any other relevant information available in determining whether these proposed revisions meet the requirements of § 110(a) of the Clean Air Act as amended and the implementing regulations found in 40 CFR Part 51 prior to making a final decision regarding approval/disapproval of the Indiana proposal.

42 U.S.C. 1857c-5(a).

Dated: April 22, 1975

FRANCIS T. MAYO,
Regional Administrator,
Region V.

[FR Doc.75—11494 Filed 5—175; 8:45 am]

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40 Fed. Reg. 50, 032-33 (1975)

Title 40—Protection of the Environment

CHAPTER I—ENVIRONMENTAL PROTECTION AGENCY

[FRL 446-5]

PART 52—APPROVAL AND PROMULGATION OF STATE IMPLEMENTATION PLANS

Pursuant to section 110 of the Clean Air Act, the State of Indiana submitted to the Administrator of the United States Environmental Protection Agency an implementation plan on January 31, 1972 to achieve the National Ambient Air Quality Standards. The plan was approved by the Administrator on May 31, 1972 (37 FR 10842) with several exceptions. Subsequent to the May 31, 1972 action, the State submitted amended sulfur dioxide, hydrocarbon, and carbon monoxide

regulations for stationary sources which the Administrator approved on May 14, 1973 (38 FR 12698).

Recently, the Indiana Air Pollution Control Board after public notice and hearing adopted revisions to regulations APC–13, APC–15, APC–16, and APC–17, and adopted new regulations APC–18, APC–20, and APC–22. On March 7, 1974, the Technical Secretary of the Air Pollution Control Board (APCB), acting for the Governor of Indiana, submitted to the Regional Administrator new regulations, APC—18 and APC–20. On October 3, 1974 the Technical Secretary submitted revised regulations APC–16, APC–17, and new regulation APC–22. On November 9, 1974, the Technical Secretary submitted revised regulations APC–3 and APC–15, and on December 5, 1974, submitted a revised APC–13. With the revised regulations, the State submitted a technical support document describing the rationale for the changes to the regulations.

On May 2, 1975, the Regional Administrator of the U.S. EPA, Region V, published for public comment these proposed revisions to the regulations contained in the Indiana State Implementation P.an (SIP). The regulatory changes affect the control of five criteria pollutants; total suspended particulates, sulfur dioxide, hydrocarbons, nitrogen oxides, and carbon monoxide. Regulations establishing timetables for particulate control (APC–18) and controlling fugitive dust (APC–20) were included in the notice. Most significant however, was a regulation (APC–22) which classifies counties within Indiana according to the need for control of emissions from sources located in each county, in fact, a wholesale revision of the applicable control strategy for all pollutants.

In the rulemaking proposal, eleven counties in Indiana were singled out for being unacceptably classified by APC–22 for purposes of sulfur dioxide controls set forth in APC–13, based on EPA's preliminary review of the State's technical support document. The EPA review of the technical support document supporting the proposed rulemaking indicated that an "A" Classification for those counties might be more appropriate. Public utility companies have submitted air

quality, omission and meteorological data to demonstrate that a "C" classification would be appropriate in most counties. As a result of a meeting between EPA and State officials, the State has undertaken a reassessment of the APC–22 classifications for the eleven counties based on a Federally approved methodology involving use of computerized dispersion modeling in which sources are examined for their impact on air quality. This work is currently under review in conjunction with other submitted data by the regional office and final rulemaking action on APC–13 and pertinent portions of APC–22 will take place shortly.

This notice finalizes action APC–3, APC–16, APC–17, APC–18, APC–20, and APC–22, insofar as it classifies counties for purposes of controlling total suspended particulates, carbon monoxide, and nitrogen dioxide. Final action on APC–13, APC–15, and the APC–22 classification of counties for sulfur dioxide and hydrocarbon control will be forthcoming.

New APC–3, the visible emission regulation, varies from the approved regulation in several respects, the most significant of which is the introduction of a 15-minute exemption period in each 24-hour period. The power companies submitted comments to the effect that such an exemption is necessary for them when starting fires or cleaning units. Since sections 2(a) and 2(b) of APC–3 already provide an exemption to visible emission requirements for fuel-burning sources in such circumstances, this comment appears to be superfluous. Generally, visible emission regulations correspond to the surveillance requirement set forth at 40 CFR 51.10(c) and section 3 of APC–3 indicates that such was the intent of Indiana. However, certain intermittent sources, such as coke batteries and roof monitors, may cause gross visible emissions and remain within the exempted time limits. For such sources at least, APC–3 would be ineffective and impractical as a surveillance technique if indeed it could be deemed available. Such being the case, it is incumbent upon the State to demonstrate that failure of intermittent sources to comply with APC–3 during the exempted time period would not result in an interference with attainment and

maintenance of the standards [40 CFR 51.13(c)(1)]. The State has failed to present such a demonstration. Accordingly, APC–3 must be disapproved to the extent that the 15-minute exemption provision in section 1 fails to meet the requirements of §§ 51.13 (c)(1) and 51.19(c). It should also be noted that EPA will not regard itself as bound by exemptions granted by the Board pursuant to section 2(c). Such exemptions must be considered on a case by case basis for impact on attainment and maintenance of the standards.

Other comments from industry and the utilities criticized APC–3 for vagueness and generally conveyed a need for clarification of terms. EPA is concerned about the confusion caused by the regulation but believes most difficulties can be resolved by administrative resolution. Such resolutions to the extent that EPA considers them substantive changes would need to be reviewed by EPA for consistency with the implementation plan before becoming effective.

New APC–16, control of carbon monoxide (CO) emissions from stationary sources, in conjunction with the classification of counties in APC–22 for purposes of CO control, effectively removes all existing stationary sources of CO from the applicable control strategy. A review of the last several years of air quality data showed few violations of the standards. The small number of stationary CO sources in Indiana and the fact that the bulk of CO emissions are mobile source initiated are reasons for EPA's approval of this strategy revision. APC–16 will require control for new stationary CO sources to assist in maintenance of the standards.

New APC–17, control of nitrogen dioxide (NO_2) emissions from stationary sources, in conjunction with the classification of counties in APC–22 for purposes of NO_2 control, effectively removes all stationary sources of NO_2 from the applicable control strategy. EPA's reclassification of AQCR's placed all but the Indiana portion of the major metropolitan Chicago AQCR in attainment status (39 FR 16344, May 8, 1974). The available air quality data in the Northwest Indiana Area indicates no standard violations. Accordingly, EPA will approve this strategy revision, APC—17 will require control

of new stationary NO_2 sources to assist, in maintaining the standard, and in reference to fossil fuel generators is consistent with Federal New Source Performance Standards for emissions of nitrogen dioxide (40 CFR Part 60.44).

APC—18 represents a series of compliance schedules affecting the various sources of particulate matter. In all cases, the final compliance date was on or before May 31, 1975. Since approval of APC—18 at this late date would be purely academic, EPA will request the State to withdraw the regulation as a plan revision in accordance with comments submitted by the Technical Secretary of the APCB.

APC—20 addresses the control of fugitive dust emissions. Comments received from industry indicated a general disatisfaction with the regulation because of vagueness and unenforceability. While EPA recognizes the desirability in including a fugitive dust emission limitation in an air quality implementation plan, the State has been advised of our reservations concerning the inclusion of a vague or ambiguous regulation in the Indiana Implementation plan. State officials have indicated a willingness to clarify the ambiguities. In the interim EPA will approve APC—20 with the exception of section 2(d) relating to visible emission violations. State personnel have indicated that no person has ever been cited for violation solely of section 2(d). Accordingly, EPA will disapprove section 2(d) of APC—20 as unenforceable. This rulemaking will be effective immediately because no additional substantive requirements are imposed on parties.

APC—22 classifies all counties in the State as A, B, or C for each criteria pollutant. While EPA is not satisfied with the State's technical support of classifications for CO an NO_2, the priority county ratings for these two pollutants will be approved for reason discussed above. Classifications for particulate, however, are unsupportable for the following reasons:

(1) Data to support the regulation is inadequate;

(2) Attainment of the National Ambient Air Quality Standards has not been addressed.

(3) Maintenance of the National Ambient Air Quality Standards has not been addressed.

Thus, this classification fails to meet the requirements of 40 CFR 51.3 and accordingly is disapproved.

Final rulemaking action on the ozone and sulfur dioxide county classifications will take place at the same time as action on APC—15 and APC—13.

With the exception of the above-noted disapproval actions and material returned to the State or held in abeyance pending further review, the proposed revisions meet the substantive and procedural requirements of Section 110 of the Clean Air Act and 40 CFR Part 51 and are hereby approved as revisions to the Indiana Implementation Plan, effective immediately.

A technical support document discussing the background for the decisions noted above is available for inspection in the Region V office of the U.S. Environmental Protection Agency, 230 South Dearborn, Chicago, Illinois 60604, and the Indiana State Air Pollution Control Board, State Board of Health, 1330 West Michigan Street, Indianapolis, Indiana 46206.

(42 USC 1857c-5(a))

Dated: October 21, 1975.

JOHN QUARLES,
Acting Administrator.

Part 52 of Chapter I, Title 40, of the Code of Federal Regulations is amended as follows:

1. Section 52.770 is amended by adding paragraph (d)(2) as follows:

§ 52.770 Indentification of plan.

* * * * *

(d) * * *

(2) March 7, 1974, October 3, 1974 and November 8, 1974 the Technical Secretary of the Air Pollution Control Board acting for the Governor of Indiana.

2. Section 52.771 is amended by adding paragraph (b) as follows (the existing unlettered paragraph becomes paragraph (a)):

§ 52.771 Classification of regions.

* * * * *

(b) The requirements of 51.3(a) of this chapter are not met by the classification of counties in APC—22 for the purposes of attainment and maintenance of the total suspended particulate ambient air quality standards.

3. Section 52.776 is amended by adding paragraph (c) as follows:

§ 52.776 Control strategy. Particulate matter.

* * * * *

(c) APC—3 of Indiana's Air Pollution Control Regulations (visible emission limitation) is disapproved insofar as the phrase "for more than a cumulative total of 15 minutes in a 24-hour period" will interfere with attainment and maintenance of particulate standards.

4. Section 52.781 is amended by adding paragraph (e) as follows:

§ 52.781 Rules and regulations.

* * * * *

(c) Section 2(d) of APC—20, Fugitive Dust emissions, is disapproved because it is unenforceable within the terms of the regulation.

5. Section 52.792 is added as follows:

§ 52.792 Source surveillance.

(a) The requirements of 51.19(c) of this chapter are not met by the phrase "for more than a cumulative total of 15 minutes in a 24-hour period" contained in Section 1 of APC—3 of the Indiana Air Pollution Control Regulations.

[FR Doc. 75-28779 Filed 10-24-75;8:45 am]

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44 Fed. Reg. 2402-03 (1979)

ENVIRONMENTAL PROTECTION AGENCY

[40 CFR Part 65]

[FRL 1021-4]

DELAYED COMPLIANCE ORDERS

Proposed Disapproval of an Administrative Order Issued by Indiana Air Pollution Control Board to Youngstown Sheet & Tube Co.

AGENCY: U.S. Environmental Protection Agency.

ACTION: Proposed rule.

SUMMARY: U.S. EPA proposes to disapprove an Administrative Order issued by the Indiana Air Pollution Control Board to Youngstown Sheet and Tube Company. The Order requires the Company to bring air emissions from its Sinter plant in East Chicago, Indiana, into compliance by July 1, 1979, with Regulations APC–3 and APC–5 of the Indiana Air Pollution Control Board (Indiana APC–3 and Indiana APC–5). It is important to note that Indiana APC–3 is different than State Implementation Plan (SIP) APC–3, as will be discussed later. Because the Order has been issued to a major source and purports to permit a delay in compliance with provisions of the SIP, it must be approved by U.S. EPA before it can become effective as a Delayed Compliance Order Under the Clean Air Act (the Act). If approved by U.S. EPA, the Order would constitute an addition to the SIP. In addition, a source in compliance with an approved Order may not be sued under the Federal enforcement or citizen suit provisions of the Act for violations of the SIP regulations covered by the Order. The purpose of this notice is to invite public comment on U.S. EPA's proposed disapproval of the Order as a Delayed Compliance Order.

DATE: Written comments must be received on or before February 12, 1979.

ADDRESSES: Comments should be submitted to Director, Enforcement Division, EPA, Region V, 230 South

Dearborn Street, Chicago, Illinois 60604. The State Order, supporting material, and public comments received in response to this notice may be inspected and copied (for appropriate charges) at this address during normal business hours.

FOR FURTHER INFORMATION CONTACT:

Mr. Michael Smith, Enforcement Division, U.S. Environmental Protection Agency, 230 South Dearborn Street, Chicago, Illinois 60604. Telephone (312) 353-2082.

SUPPLEMENTARY INFORMATION: Youngstown Sheet and Tube Company operates a Sinter plant at East Chicago, Indiana. The Order under consideration addresses emissions from the Sinter plant which is subject to Indiana APC–3 as promulgated on October 7, 1974, and APC–5 as promulgated on December 6, 1968. Indiana APC–3 sets the standards for visible emissions, but is less stringent than the federally approved SIP APC–3. The Order does not require compliance with the applicable Indiana SIP. The Order, at Order paragraph 1, requires compliance with "* * * Indiana Air Pollution Control Board Regulations APC–3 and APC–5, as promulgated October 7, 1974 and December 6 1968 respectively. * * *" The cited Indiana APC–3 contains a 15 minute exemption which was disapproved when submitted by the State (40 FR 50032, October 28, 1975) and does not appear as part of the Indiana Implementation Plan. An approval of this Order would constitute approval of compliance with a requirement less stringent than the applicable Indiana implementation Plan and is not authorized by section 113(d)(1) of the Act.

The Order also provides for an extension of dates by which certain events are required under the Order, upon certain "satisfactory showing(s)". Such extensions cannot be accomplished except by means of the rulemaking process for Order approval.

The Order contains provisions which would shield the Company from civil or criminal penalties if certain vaguely defined events occur. Such provisions eliminate effective State enforcement of the provisions of the Order and could

impair Federal enforcement contrary to sections 113(d)(1), (9), (10) of the Act. For these reasons, the U.S. Environmental Protection Agency proposes to disapprove the state Order.

Because this Order has been issued to a major source of visible emissions and permits a delay in compliance with the applicable regulation, it must be approved by U.S. EPA before it becomes effective as a Delayed Compliance Order under section 113(d) of the Act. U.S. EPA may approve the Order only if it satisfies the appropriate requirements of this subsection.

If the Order is disapproved by U.S. EPA, source compliance with its terms would not preclude Federal enforcement action under Section 113 of the Act against the source for violations of the regulation covered by the Order during the period the Order is in effect. Enforcement against the source under the citizen suit provision of the Act (Section 304) would similarly not be precluded. If disapproved, the Order would not constitute an addition to the Indiana SIP.

All interested persons are invited to submit written comments on the proposed disapproval of the Order. Written comments received by the date specified above will be considered in determining whether U.S. EPA will disapprove the Order. After the public comment period, the Administrator of U.S. EPA will publish in the FEDERAL REGISTER the Agency's final action on the Order in 40 CFR Part 65.

(Authority: 42 U.S.C. 7423, 7601.)

Dated: November 28, 1978.

JOHN MCGUIRE,
Regional Administrator, Region V.

[FR Doc. 79–912 Filed 1–10–79; 8:45 am]

44 Fed. Reg. 12,461–63 (1979)

[40 CFR Part 65]

[FRL 1051–2]

DELAYED COMPLIANCE ORDERS

Proposed Disapproval of an Administrative Order Issued by Indiana Air Pollution Control Board to Bethlehem Steel Corp.

AGENCY: U.S. Environmental Protection Agency.

ACTION: Proposed rule.

SUMMARY: U.S. EPA proposes to disapprove an Administrative Order issued by the Indiana Air Pollution Control Board to Bethlehem Steel Corporation. The Order requires the Company to bring air emissions from its coke oven batteries in Burns Harbor, Indiana, into compliance by July 1, 1979, with Regulations APC–3 and APC–5 of the Indiana Air Pollution Control Board (Indiana APC–3 and Indiana APC–5). It is important to note that Indiana APC–3 is different than State Implementation Plan (SIP) APC–3. Because the Order has been issued to a major source and permits a delay in compliance with provisions of the SIP, it must be approved by U.S. EPA before it becomes effective as a Delayed Compliance Order under the Clean Air Act (the Act). If approved by U.S. EPA, the Order would constitute an addition to the SIP. In addition, a source in compliance with an approved Order may not be sued under the Federal enforcement or citizen suit provisions of the Act for violations of the SIP regulations covered by the Order. The purpose of this notice is to invite public comment on U.S. EPA's proposed disapproval of the Order as a Delayed Compliance Order.

DATE: Written comments must be received on or before April 6, 1979.

ADDRESSES: Comments should be submitted to Director, Enforcement Division, U.S. Environmental Protection Agency, Region V, 230 South Dearborn Street, Chicago, Illinois 60604. The State Order, supporting material, and

public comments received in response to this notice may be inspected and copied (for appropriate charges) at this address during normal business hours.

FOR FURTHER INFORMATION CONTACT:

Michael Smith, Enforcement Division, U.S. Environmental Protection Agency, 230 South Dearborn Street, Chicago, Illinois 60604, at (312) 353-2082.

SUPPLEMENTARY INFORMATION: Bethlehem Steel Corporation operates a steel production facility at Burns Harbor, Indiana. The Order under consideration addresses emissions from two coke oven batteries at the facility, which are subject to Indiana APC–3 as promulgated on October 7, 1974, and Indiana APC–5, as promulgated on December 6, 1968. Indiana APC–3 sets the standards for visible emissions, but is less stringent than the federally approved SIP APC–3. The Order does not require compliance with the applicable Indiana SIP. The cited Indiana APC–3 contains a 15-minute exemption which was disapproved when submitted by the State (40 FR 50032, October 28, 1975) and does not appear as part of the Indiana SIP. An approval of this Order would constitute approval of compliance with a requirement less stringent than the applicable Indiana SIP and is not authorized by Section 113(d)(1) of the Act. There are several other points in the Order which do not meet U.S. EPA's approval. These include:

(1) Paragraph 10 of the Findings states that there is no currently available control technology guaranteed to bring coke batteries into compliance—but that the Order was a "best effort" program. This is contrary to the U.S. EPA's position that controls exist that can attain compliance and it undercuts the reasonableness and enforceability of the Order.

(2) Paragraph 2 of the Order states that notwithstanding paragrah 1 (Requirement for compliance), Bethlehem may challenge the applicability and technical feasibility of APC–3 and APC–5, should it fail to comply with the regulations. This means that Bethlehem agrees to install equipment, but if it fails to comply with the regulations,

it may challenge the regulations. This equates to no *real* agreement or Order to comply with the regulations.

(3) Paragraph 8 contains a clause which states that if there is a delay in meeting interim or final dates for pushing controls (and compliance) which is "Not within the reasonable control of" Bethlehem, then the Board agrees not to impose or seek criminal or civil penalties. The Board also agrees not to seek criminal penalties for delay (from such events) in meeting the final date for charging controls (and compliance), and no civil or criminal penalties for delays beyond the interim charging program dates. These provisions amount to agreements not to enforce violations of the Order.

(4) U.S. EPA is not satisfied that the program to control stack emissions is sufficient to attain compliance.

(5) The State Order addresses each operation (push, charge, etc.) separately. Regulation APC–5 considers the entire coke battery to be a single "process." In addressing the operations separately, there is *no* requirement for compliance at the stacks, standpipes, doors, etc.

In addition, a civil action has been initiated by U.S. EPA under Section 113(b) of the Act against the Bethlehem Steel Corporation. This action is based, in part, upon violations of regulations APC–3 and APC–5 of the Indiana State Implementation Plan by the Company's coke batteries located in Burns Harbor, Indiana. Because the civil action addresses the facilities which are the subject of the Order under consideration, the filing of the action in itself constituted a rejection of the Order issued by the Indiana Air Pollution Control Board.

Because this Order has been issued by the State to a major source of emissions and permits a delay in compliance with the applicable regulations, it must be approved by U.S. EPA before it can become effective as a Delayed Compliance Order under Section 113(d) of the Act. U.S. EPA may approve the Order only if it satisfies the appropriate requirements of this subsection.

If the Order is disapproved by U.S. EPA, source compliance with its terms would not preclude Federal enforcement action under Section 113 of the Act against the source for violations of the regulations covered by the Order during the period the Order is in effect. Enforcement against the source under the citizen suit provision of the Act (Section 304) would similarly not be precluded. If disapproved the Order would not constitute an addition to the Indiana SIP. All interested persons are invited to submit written comments on the proposed disapproval of the Order.

Written comments received by the date specified above will be considered in determining whether U.S. EPA will disapprove the Order. After the public comment period, the Administrator of U.S. EPA will publish in the FEDERAL REGISTER the Agency's final action on the Order in 40 CFR Part 65.

AUTHORITY: 42 U.S.C. 7413, 7601.

Date: January 26, 1979.

JOHN MCGUIRE,
Regional Administrator,
Region V.

CAUSE NO. A-59

FINDINGS OF FACT

Air Pollution Control Board of the State of Indiana, Plantiff v. Bethlehem Steel Corporation, Burns Harbor, Indiana, Respondent.

1. That the Air Pollution Control Board of the State of Indiana ("the Board") is an agency of the State of Indiana duly empowered pursuant to IC 13–1–et seq., to act upon complaints of alleged air pollution brought by any person and to issue such orders with respect thereto as it deems proper.

2. That the Board has jurisdiction over both the subject matter and the parties to this action.

3. That pursuant to the provisions of IC 13–1–1 and 13–7–11–2, notice and service of same is hereby waived by Respondent.

4. That Bethlehem Steel Corporation owns and operates a steel production facility in Burns Harbor, Indiana.

5. That as part of its steel production process, Respondent owns and operates two by-product coke oven batteries.

6. That notwithstanding the control systems presently installed and operating, the Board's investigation of the operation of the coke oven batteries discloses possible violations of the standards set forth in Indiana Regulations APC 3 and APC 5.

7. That on March 29, 1973, the Board adopted a valid Order between the Respondent and the Board. Said Order set forth dates for compliance with Indiana Regulations APC 3, and APC 5 by Respondent. On July 24, 1973; February 26, 1975; October 22, 1975; June 23, 1976; and August 24, 1977, Amendments No. 1, No. 2, No. 3, No. 4, and No. 5, respectively, to that Order were adopted by the Board, which Amendments amended and superseded certain dates for compliance by the dates outlined in said Amendments. That for purpose of clarity, the schedules for compliance are incorporated in their entirety, including both incremental dates that have passed and those yet to come.

8. That in order to comply with the Delayed Compliance Order requirements of the Clean Air Act as amended August 7, 1977, both the Respondent and the Board desire that these Findings of Fact and Recommended Order amend and supersede the Order adopted March 29, 1973, as amended, with respect to the pushing and charging emissions from Batteries No. 1 and No. 2 set forth herein.

9. That after a thorough investigation of all relevant facts, including public comment, the Board has determined that the Respondent is unable to immediately comply with with the requirements of APC 3 and APC 5, where applicable, at the Burns Harbor Plant Coke Oven Batteries, and therefore, pursuant to Section 113(d) of the Federal Clean Air Act, issues this Delayed Compliance Order which:

(A) Has been issued after notice to the public containing the contents of the proposed order and opportunity for public hearing;

(B) Contains a schedule and timetable for compliance;

(C) Requires compliance with applicable interim requirements and requires the emission monitoring and reporting by the source authorized to be required under Sections 110(a)(2)(F) and 114(a)(1) of the Federal Clean Air Act;

(D) Provides for final compliance with the requirements of the applicable regulations as expeditiously as practicable, but in no event later than July 1, 1979; and,

(E) Hereby notifies the Respondent that unless exempted under Section 120(a)(2)(B) or (C), of the Federal Clean Air Act, it will be required to pay a noncompliance penalty effective July 1, 1979, in the event Respondent fails to achieve final compliance by July 1, 1979.

10. That there is no readily available control technology or known operating technologies guaranteed to bring coke batteries into compliance with the Indiana Regulations APC 3 and APC 5. The compliance program set forth in the following Order, however, represents the best efforts of the Board and the Respondent to devise a program to provide for achieving compliance with APC 3 and APC 5 by July 1, 1979.

11. That pursuant to Section 107 of the Federal Clean Air Act, as amended, the area in the vicinity of the Burns Harbor Plant has been recommended by the Board and designated by the United States Environmental Protection Agency on March 3, 1978, as unclassifiable with respect to attainment of the National Ambient Air Quality Standard for particulate matter.

12. That on March 22, 1978, the Board approved for public hearing revised regulation APC–3 regarding visible emisisons and new Regulation APC–9 regarding coke oven emissions which, if promulgated as proposed, may alter the performance required to achieve compliance with State regulations at the coke oven batteries.

Recommended Order

Now, therefore, based upon the above Findings of Fact and upon consent of the parties, *it is hereby ordered, adjudged and decreed* as follows:

1. That Respondent, Bethlehem Steel Corporation, shall abate particulate emissions according to the following schedule which provides for compliance with Indiana Air Pollution Control Board Regulations APC–3 and APC–5 no later than July 1, 1979.

A. Pushing Emissions.

1. Submit final plans for three enclosed coke guides, two quench cars, and two stationary gas cleaning systems with associated air pollution control equipment for Batteries No. 1 and No. 2 by October 31, 1976.

2. Place purchase orders by November 30, 1976.

3. Complete installation by November 30, 1978.

4. Achieve compliance by February 15, 1979.

B. Charging Emissions.

1. Submit program for modified stage charging by September 1, 1977.

2. Commence issuance of purchase orders pursuant to preliminary engineering by October 31, 1977.

3. Commence construction by April 1, 1978.

4. Complete engineering by July 31, 1978.

5. Complete construction by June 3, 1979.

6. Achieve compliance by July 1, 1979.

2. That notwithstanding the provisions of paragraph 1 hereof, nothing herein shall be or shall be deemed to be a waiver of Respondent's right to challenge the applicability or technical feasibility of Indiana Air Pollution Control Board Regulations APC–3 nd APC–5 in any action brought to enforce the terms and conditions of this Order, which action is based in whole or in part on a failure to achieve compliance with said Regulations, provided, however, that this provision shall not excuse the Respondent from installing the control equipment committed to in paragraph 1 of this Order.

3. That in the interim and until the time that compliance with Indiana Regulation APC–3 and APC–5 is achieved, Respondent shall employ the Operation and Maintenance Practice Program attached to this Order as Exhibit I with respect to the pushing and charging emissions from Batteries No. 1 and No. 2. This is the best practicable system of emissions reduction for the interim period.

4. That beginning thirty (30) days after the date of this Order, quarterly progress reports shall be submitted by the Respondent to the Board. Respondent shall include in such reports emission monitoring data required by paragraph 5 of this Order.

5. Respondent shall monitor the pressure drop and water flow rate of the land-based scrubber on Coke Oven Batteries No. 1 and No. 2, and shall maintain such data at the office of the Environmental Control Department at Burns Harbor and make such data available for inspection upon the request of a staff member of the Air Pollution Control Division.

6. That upon application of Respondent, the provisions of this Order and plans and schedules submitted and approved hereunder may be modified by the Board when air pollution control standards applicable to the by-product coke ovens are changed; provided, however, that this Order shall be construed to provide for final compliance with the requirements of the applicable regulations as expeditiously as practicable, but in no event later than July 1, 1979, or three years after the date for final compliance with such requirement specified in such regulations, whichever is later. Any order, decision or other action taken by the Board upon such application may be appealed to the courts of the State as provided by IC 4–22–1–1 et seq.

7. Failure of the Respondent to achieve final compliance with Indiana Regulations APC–3 and APC–5 by July 1, 1979, may subject Respondent to a claim for a noncompliance penalty in accordance with Section 120 of the Clean Air Act, 42 USC 7420 and any State Regulations that may be submitted to and approved by the Administrator in accord-

ance with that Section. Notwithstanding the above, Respondent reserves the right to contest in any forum the application of such penalty for noncompliance to any source covered by this Order.

8. That should events occur which cause a delay in meeting any interim dates established in this Order and these events are entirely beyond the control of the Respondent, upon application of Respondent these dates may be modified by the Board. Any order, decision or other action taken by the Board upon such application may be appealed to the courts of the State as provided by IC 4-22-1-1 et seq.

Should the Air Pollution Control Board, after hearing, determine that a delay in meeting the requirements of Section 1(A) of this Order is due to events which are not within the reasonable control of the Respondent, the Air Pollution Control Board agrees not to impose or seek any civil or criminal penalties for any delay beyond either the interim dates set forth in this Order or the July 1, 1979, date established by the Clean Air Act, other than those provided for under Section 120 of the Clean Air Act. Should the Air Pollution Control Board after hearing determine that a delay in meeting the requirements of Section 1(B) of this Order is due to events which are not within the reasonable control of Respondent, the Air Pollution Control Board agrees not to impose or seek criminal penalties for delays beyond the July 1, 1979, date established by the Clean Air Act or civil or criminal penalties for any delays beyond any of the interim dates set forth in this Order, other than those provided for under Section 120 of the Clean Air Act or rules or regulations promulgated thereunder.

9. This Order shall terminate with respect to any of the operations referred to in Section 1(A) or 1(B) as of the date that emissions from such operations are in compliance.

10. That nothing herein contained shall in any way affect the Board's right to enforce Air Pollution regulations which deal with provisions not covered by this Order.

I have reviewed the above Findings of Fact and Recommended Order and hereby recommend that the Air Pollution Control Board adopt this as its Final Order.

Dated: November 15, 1978.

HARRY D. WILLIAMS,
Director,
Air Pollution Control Division.

I am duly authorized to legally bind Bethlehem Steel Corporation in this matter, and I have received a copy of the above Recommended Order and agree to be bound by said Order when issued by the Board and hereby waive the notice required by Indiana Code 13-1-1 and 13-7-11-2.

Dated: November 13, 1978.

C. R. ROUGH,
Bethlehem Steel Corporation.

[FR Doc. 79-6940 Filed 3-6-79; 8:45 am]

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44 Fed. Reg. 20,432-49 (1980)

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 81

[FRL 1449-1]

Approval and Promulgation of Nonattainment Plan for Indiana

Agency: U.S. Environmental Protection Agency.

Action: Proposed rulemaking.

SUMMARY: The purpose of this notice is to announce the receipt of a State Implementation Plan (SIP) revision for Indiana, to discuss the results of the United States Environmental Protection Agency's (USEPA) review of that revision, and to invite public comment.

On June 26, 1979, the State of Indiana submitted to USEPA a proposed revision of its SIP pursuant to Part D of the Clean Air Act as amended in 1977. The revision applies to areas of Indiana that have not attained the national Ambient Air Quality Standards (NAAQS) for sulfur dioxide, ozone, carbon

monoxide, and particulates. As required by the Act, the purpose of this revision is to implement measures for controlling the emissions of these pollutants in nonattainment areas and to demonstrate that these measures will provide for attainment of the national Ambient Air Quality Standards as expeditiously as practicable, but not later than December 31, 1982 for the primary standards; or by December 31, 1987, under certain conditions, for ozone and carbon monoxide. The requirements for an approvable SIP are described in a Federal Register notice published on April 4, 1979 (44 FR 20372), and are not reiterated in this notice.

Supplements to the April 4, 1979 notice were published on July 2, 1979 (44 FR 38583), August 28, 1979 (44 FR 50371), and September 17, 1979 (44 FR 53761) and November 23, 1979 (44 FR 67182) discussing, among other things, additional criteria for SIP approval.

In addition to addressing the requirements of Part D, the Indiana SIP revision incorporates certain general requirements of the Clean Air Act as amended.

DATE: Comments on this revision and on the proposed USEPA action on the revisions are due by April 29, 1980.

ADDRESSES: Copies of the SIP revision are available at the following addresses for inspection:

United States Environmental Protection Agency, Region V Air Programs Branch, 230 South Dearborn, Chicago, Illinois 60604.

United States Environmental Protection Agency, Public Information Reference Unit, 401 M Street, S.W., Washington, D.C. 20460.

Indiana State Board of Health, Air Pollution Control Division, 1330 West Michigan, Indianapolis, Indiana 46206.

WRITTEN COMMENTS SHOULD BE SENT TO: Gary Gulezian, Chief, Regulatory Analysis Section, Air Programs Branch, USEPDA Region V, 230 South Dearborn, Chicago, Illinois 60604.

FOR FURTHER INFORMATION CONTACT:
Gary Gulezian, Chief, Regulatory Analysis Section, Air Programs Branch, USEPA Region V, 230 South Dearborn, Chicago, Illinois 60604 (312) 886-6029.

SUPPLEMENTARY INFORMATION: On March 3, 1978 (43 FR 8962) and October 5, 1978 (43 FR 45993), pursuant to the requirements of section 107 of the Clean Air Act (Act) as amended, USEPA designated certain areas in each state as not meeting the National Ambient Air Quality Standards for total suspended particulates (TSP), sulfur dioxide (SO_2) carbon monoxide (CO), photochemical oxidants (ozone), and nitrogen dioxide (NO_2).

Part D of the Act, which was added by the 1977 Amendments, requires each state to revise its SIP to meet specific requirements for areas designated as nonattainment. These SIP revisions must demonstrate attainment of the primary National Ambient Air Quality Standards as expeditiously as practicable, but not later than December 31, 1982. Under certain conditions that date may be extended to December 31, 1987 for ozone and/or carbon monoxide.

On June 26, 1979, the State of Indiana submitted a portion of its revised SIP to USEPA so that the Agency could review the plan and solicit public comment both on the plan provisions and on USEPA's proposed rulemaking. The proposed SIP revision addressed the Clean Air Act requirements for a nonattainment SIP and some general requirements for a statewide SIP.

The measures proposed for promulgation today will be in addition to, and not in lieu of, existing SIP regulations. The present emission control regulations for any source will remain applicable and enforceable to prevent a source from operating without controls, or under less stringent controls, while it is moving toward compliance with the new regulations; or if it chooses, challenging the new regulations. In some instances, the present emission control regulations contained in the federally-approved SIP are different from the regulations currently being enforced by the State. In these situations, the present federally-approved SIP will

remain applicable and enforceable until there is compliance with the newly promulgated and federally approved regulations. Failure of a source to meet applicable pre-existing regulations will result in appropriate enforcement action, including assessment of noncompliance penalties. Furthermore, if there is any instance of delay or lapse in the applicability or enforceability of the new regulations, because of a court order or for any other reason, the pre-existing regulations will be applicable and enforceable.

The only exception to this rule is in cases where there is a conflict between the requirements of the new regulations and the requirements of the existing regulations such that it would be impossible for a source to comply with the preexisting SIP while moving toward compliance with the new regulations. In these situations, the State may exempt a source from compliance with the preexisting regulations. Any exemptions granted will be reviewed and acted on by USEPA either as part of these promulgated regulations or as a future SIP revision.

This notice discusses USEPA's review of the proposed Indiana SIP in two parts: (1) The strategies developed by Indiana to meet National Ambient Air Quality Standards for each pollutant in designated nonattainment areas; and (2) The revisions necessitated by general requirements of the Clean Air Act Amendments.

In its review, USEPA has specified portions of the proposed SIP as being approvable and not approvable. USEPA will conditionally approve the plan if the State proposal contains minor deficiencies, and if the State provides assurances that it will submit corrections on a specified schedule. The schedules must be negotiated between the USEPA Regional Office and the State within the public comment period announced in this Notice. The negotiated schedules will be announced for public comment in a separate Notice of Proposed Rulemaking. A conditional approval will mean that the restrictions on new major source construction will not apply unless the State fails to submit the necessary revisions by the scheduled date, or if the revisions are not approved

by USEPA. Conditional approvals will not be granted without strong assurances by the appropriate State official(s) that the deficiences will be corrected by the specified date.

USEPA solicits comments on both the proposed SIP revisions and the proposed USEPA action on these revisions from all interested parties. USEPA specifically solicits public comment on the proposals for conditional approval. USEPA also encourages residents and industries in adjoining States to comment on any interstate air quality impacts of the proposed Indiana SIP revision.

On August 14, 1979 a Notice of Availability was published in the Federal Register (44 FR 47559) announcing the receipt and availability for review of the proposed revisions to the Indiana SIP and informing the public that a comment period of less than 60 days might be provided. A thirty-day comment period is being provided because the July 1, 1979 statutory deadline for USEPA approval of revisions for nonattainment areas has already passed. To be considered, comments on this revision and on the proposed USEPA action on the revision must be postmarked not later than thirty days from the publication of this Notice of Proposed Rulemaking. If, however, interested parties require additional time to comment on USEPA's proposed rulemaking actions, they can petition USEPA at the above address for an extension of the comment period. Requests for extension of the comment period must be received by USEPA prior to the closing of the thirty-day comment period announced in this Notice of Proposed Rulemaking.

Plan Requirements for Nonattainment Areas

In addition to the general requirements applicable to all State implementation plan revisions pursuant to section 110, the revised plan must satisfy the general requirements of Part D of the Act. USEPA has reviewed the proposed revision to the Indiana Implementation Plan to determine if it meets these Part D requirements. Any deficiencies are discussed in the following portions of this Federal Register on specific regulations and pollutants.

General Regulations

Indiana has submitted several regulations which are not related to any one pollutant. These regulations are Air Pollution Control (APC) Regulation 1 containing definitions for use in all Indiana Air Pollution Control regulations; Regulation APC 11 establishing a reporting procedure for malfunctions, a maintenance program requirement for emission control equipment, and a malfunction emission reduction program; Regulation APC 19 establishing requirements for permits for the construction, modification, or operation of facilities and emission control devices; and Regulation APC 22 detailing the attainment and nonattainment areas of the State for the criteria pollutants. A discussion of USEPA's review of these regulations follows:

Regulation APC 1

Many of the comments concerning definitions in this regulation are containing in the following sections of this notice on specific regulations and are not reiterated here. Some of the definitions in the proposed revision are used in regulations which have not yet been submitted to USEPA. Consequently, although USEPA approves these definitions generally, it may be necessary to disapprove the definitions later within the context of the specific regulations.

The Indiana regulation contains a definition of "Nonphotochemically Reactive Hydrocarbons" which includes methyl chloroform and methylene chloride and, in effect exempts them from controls.

These volatile organic compounds (VOC's) while not appreciably affecting ambient ozone levels, are potentially harmful in other respects. Both methyl chloroform and methylene chloride have been identified as mutagenic in bacterial and mannalian cell test systems, a circumstance which raises the possibility of human mutagenicity and/or carcinogenicity. With the exemption of these compounds, some sources, particularly existing degreasers, will be encouraged to utilize methyl chloroform in place of other more photochemically reactive degreasing solvents. Such

substitution has already resulted in the use of methyl chloroform in amounts far exceeding those of other solvents. Endorsing the use of methyl chloroform by exempting it in the SIP revision can only further aggravate the problem by increasing the emissions produced by existing primary degreasers and other sources.

The USEPA is concerned that the State has chosen this course of action without full consideration of the total environmental and health implications. The USEPA does not intend to disapprove the State SIP submittal if, after due consideration, the State chooses to maintain these exemptions. The Agency is, however, concened that this policy not be interpreted as encouraging either the increased use of these compounds or compliance by substitution. The USEPA does not endorse such approaches. Furthermore, state officials and sources should be advised that there is a strong possibility of future regulatory action to control these compounds. Sources which choose to comply by substitition may well be required to install control systems as a consequence of these future regulatory actions.

"Positive net air quality benefit" is defined in the regulation as the net result of offsetting new allowable emissions with reduced actual or allowable emissions. This provision could be interpreted as allowing sources to claim offset credits for bringing existing sources into compliance with the applicable emission limitation. Compliance by existing sources is already considered in the SIP demonstration of attainment. Crediting these emission reductions twice will not result in progress toward attainment of NAAQS. Therefore, USEPA proposes to conditionally approve this definition if the State makes a commitment to change the definition so that positive net air quality benefit is the result of offsetting new allowable emissions with the reduced actual or allowable emissions *whichever is less.* This change in the definition must be completed on a schedule to be negotiated between the State and the USEPA Regional Office during the comment period announced in this Notice.

Finally, this regulation defines "State Implementation Plan" as the State plan of the Indiana Air Pollution Control Division. USEPA believes that this definition is confusing and misleading since a State Implementation Plan must be federally approved pursuant to the Clean Air Act. In order to eliminate any potential confusion, in regulation which states that provisions or exemptions will be submitted to the USEPA as revisions to the State Implementation Plan, clarifying language should be included noting that the revisions are to the *federally approved* State Implementation Plan.

USEPA proposes to approve the definitions in Regulation APC 1 with the exception of the definitions with deficiencies noted above and in the following sections on specific regulations. USEPA's proposed action on the definitions with deficiencies is specified in the discussion on each of these definitions. USEPA proposes to conditionally approve the deficient regulations upon commitment of the appropriate State official(s) to make the necessary corrections according to a schedule negotiated between the State and the USEPA Regional Office during the comment period announced in this Notice.

Regulation APC 11

Regulation APC 11 is a new regulation establishing a reporting procedure for malfunctions, a maintenance program requirement for emission control equipment and facilities, and a malfunction emission reduction program. USEPA has reviewed this regulation and proposes to disapprove it as a revision to the federally approved SIP. Failure to achieve USEPA approval of these provisions by July 1, 1979 does not, however, trigger economic and growth limitations because these provisions are not required by Part D of the Clean Air Act.

USEPA policy, as reflected in the Federal malfunction regulations promulgated in the April 27, 1977 Federal Register (42 FR 21472), recognizes the possibility of malfunctions but defines all periods of excess emissions as violations of the applicable emission standard in order to

reduce the frequency of such episodes by encouraging good maintenance procedures. According to this policy, the source then has the burden to demonstrate that the violation was due to an unavoidable malfunction in which case enforcement discretion may be exercised. The Federal malfunction regulations detail the enforcement procedure which will be followed when a period of excess emissions occurs and indicate how this discretion will be exercised.

The proposed Indiana revision does not require that all periods of excess emissions due to malfunctions be considered violations of the applicable standard. If a source demonstrates four things, the proposed revision provides for an automatic emission limitation exemption during such periods of excess emissions. This approach is impermissible since it creates the potential for permitting violations of the NAAQS by exempting malfunction episodes from applicable emission limitations. Pursuant to section 110 of the Clean Air Act, USEPA proposes to disapprove these malfunction provisions because they interfere with the attainment of the National Ambient Air Quality Standards. Further, the approach in this regulation is inconsistent with the enforcement imperatives of sections 110 and 113 of the Clean Air Act.

In addition, this regulation contains a provision permitting fossil-fuel fired steam generators to exceed the applicable sulfur dioxide emission limitations in no more than three 24-hour periods during any calendar month. This exemption is not approvable because it potentially interferes with the June 11, 1979 New Source Performance Standard for electric utility generators. This deficiency as well as the deficiency discussed above must be corrected before this regulation is approvable.

Regulation APC 22

This revised regulation classifies areas of the State as nonattainment, attainment, or unclassifiable for sulfur dioxide, total suspended particulates, carbon monoxide, photochemical oxidants and nitrogen oxides. These classifications conform to the federally promulgated designations

contained at 40 CFR Part 81 with one exception. Regulation APC 22 identifies Wayne County as an attainment area for the sulfur dioxide NAAQS. USEPA has designated Wayne County as a nonattainment area for sulfur dioxide. USEPA, therefore, proposes to approve Regulation APC 22 with the exception of its classification of Wayne County as an attainment area for the sulfur dioxide standards. This deficiency is discussed in greater detail below under Regulation APC 13.

Regulation APC 19—Permits, Prevention of Significant Deterioration, and Emission Offsets

Regulation APC 19 establishes requirements for the registration of specified facilities and emission control devices and for the issuance of permits for the construction, operation, and modification of specified facilities and emission control devices. In addition, this regulation contains requirements for new source review for the prevention of significant deterioration (PSD) of air quality in attainment areas and for the offsetting or emissions in nonattainment areas. The regulation also contains a section on compliance using the bubble approach. USEPA's discussion of the regulation will address both the general deficiencies in the regulation and, a review of the new source permit program in nonattainment areas. Because the PSD revisions are required under Part C of Title I of the Clean Air Act rather than under Part D, USEPA's review of the proposed PSD plan is contained in the portion of this notice addressing general SIP requirements.

General Deficiencies

1. Section 4(g) of Regulation APC 19 states that emission limitations may be established as conditions of construction and operating permits, and details a procedure for incorporating the emission limitations into the permits. Pursuant to 40 CFR 51.22, emission limitations must be adopted as rules and regulations enforceable by the State agency. In order to satisfy this regulatory requirement, limitation contained in a permit has the force and effect of a regulation. USEPA proposes to approve the placement

of emission limitations in permits if prior to USEPA final rulemaking on this regulation the State submits certification from the Indiana Attorney General that emission limitations contained in permits issued pursuant to Regulation APC 19 will have the force and effect of regulations in Indiana. Without this certification, any permits issued with emission limitations, including site specific emission limitations established by permit under Regulations APC 13 and APC 23, will not be approvable as revisions to the federally approved State Implementation Plan. If the State does not submit a certification from the Indiana Attorney General. USEPA will disapprove the following sections and portions of sections pertaining to the issuance of emission limitations in permits: Section 4(g) of Regulation APC 19; Sections 3(a), 3(q), 3(s), and 7 of Regulation APC 23; and Sections 3(b) and 8 of Regulation APC 13.

2. Section 4(h) of Regulation APC 19 specifies the timeframes within which construction permits must be issued or denied. If a permit is not issued or denied within these timeframes, the regulation provides that the permit must be issued by default. This default provision is unacceptable because it would allow a construction permit to be issued without any assurance that the National Ambient Air Quality Standards will be achieved or maintained, USEPA proposes to disapprove this default provision and proposes to conditionally approve Regulation APC 19 if the State makes a commitment to delete the default provision from the regulation. This corrective action must be carried out according to a schedule to be negotiated between the State and the USEPA Regional Office during the thirty-day comment period announced in this Notice. USEPA's disapproval of section 4(h) would mean that a source proceeding with construction would be in violation of the federally approved SIP and subject to federal enforcement action.

3. Section 172(b)(11) of the Clean Air Act requires the establishement of a program of analyses which must be completed prior to the issuance of construction permits for

major facilities locating in a nonattainment area which needs an extension beyond *December 31, 1982* to attain the ozone and/or carbon monoxide NAAQS. Section 4(b)(2) of Regulation APC 19 satisfies this statutory requirement except for a typographical error. The regulation requires analyses for those major facilities located in nonattainment areas for which an extension *beyond December 31, 1987* is necessary. USEPA proposes to conditionally approve Section 4(b)(2) of Regulation APC–19 if the State corrects this typographical error during the public comment period announced in this proposal.

New Source Permit Program

To be approvable under Part D, a preconstruction review program must assure that permits for proposed major sources and major modifications are issued in conformance with the requirements of section 173 of the Act. Those requirements and details of how the Indiana submittal conforms to them are listed below:

1. The Clean Air Act requires that each SIP accommodate growth in emissions in nonattainment areas through an emission offset program or by a planned margin for growth. Indiana has elected to use an offset approach in its preconstruction review program. Section 8(a)(2) and (4) of Regulation APC–19 specify that increased emissions resulting from proposed construction, modification, or reconstruction must equal 90% or less of offsetting emissions and that reasonable further progress must be achieved by the proposed offset.

2. Any emission reductions required under the emission offset program must be legally binding and enforceable before the permit can be issued. Section 8(e)(6) of Regulation APC–19 specifies that no emission reduction may be approved as offset which cannot be legally enforced by the IAPCB. Offsetting emissions are considered by the State to be legally enforceable if the reduction is included as a condition in either an operating or construction permit. USEPA's policy is that internal offsets are enforceable as operating construction permit

conditions while external offsets must be submitted as revisions to the SIP to be Federally enforceable. Regulation APC–19(2)(g) requires Indiana to submit emission limitations and compliance schedules contained in operating and construction permits as revisions to the Federally approved SIP. This requirement means that all offset provisions will be submitted as a part of the SIP and, if approved, Federally enforceable. The offset provisions of Regulation APC–19, therefore, meet the requirements of USEPA's policy.

3. The proposed major source or major modification must comply with the lowest achievable emission rate (LAER) as defined in Section 171(3) of the Act. The Indiana definition of LAER contained in Regulation APC–1 conforms to the Act's definition.

4. All major sources in the state owned or operated by the owner or operator of the proposed major source or major modification must be in compliance or on a schedule for compliance with the Act. Section 8(i) of Regulation APC–19 satisfies this requirement.

USEPA proposes to conditionally approve Regulation APC–19 and the new source review program if the appropriate State Officials make a commitment to correct the specified deficiencies on a schedule to be negotiated between the State and the USEPA Regional Office during the thirty day comment period announced in this Notice.

Total Suspended Particulates

Part D of the Clean Air Act requires State Implementation Plans to include strategies and regulations adequate to insure attainment of the primary National Ambient Air Quality Standards (NAAQS) as expeditiously as practicable but not later than December 31, 1982 and, in the interim, to provide reasonable further progress toward attainment through the application of reasonably available control technology (RACT).

In cases where the attainment of NAAQS cannot be demonstrated despite the application of reasonably available control technology to traditional sources of particulate matter such as industrial point and industrial fugitive sources, USEPA will approve State SIPs contingent upon a commitment by the State to study further the causes for particulate nonattainment, including the degree to which nontraditional area sources affect air quality, and to develop appropriate control measures.

Eight areas in the State of Indiana have been designated as nonattainment for both the primary and secondary particulate National Ambient Air Quality Standards. An additional three areas have been designated as nonattainment for only the secondary articulate NAAQS. Indiana has submitted control strategies and demonstrations for attaining the primary and secondary standards in three of the eight nonattainment areas. No control strategies or demonstrations were included in the submittal for the primary and secondary nonattainment areas of Marion, Lake, Clark, Vigo, and LaPorte Counties. Regulations to implement the strategies have similarly not been adopted by the State or submitted to USEPA. Therefore, although USEPA is proposing rulemaking on the submitted control strategies and demonstrations, it cannot propose rulemaking on the adequacy of the entire particulate SIP at this time. USEPA will propose rulemaking on the adequacy of the attainment demonstrations and the adequacy of the regulations to attain and maintain the NAAQS in Marion, Lake, Clark, Vigo, and LaPorte Counties and on the attainment demonstration for the entire particulate SIP upon the State's submittal of the omitted portions of the plan.

Pursuant to section 110(b) of the Clean Air Act, Indiana included a request in the submittal for an eighteen month extension of the statutory timetable for the submittal and approval of SIP revisions for attaining the secondary particulate NAAQS in Howard, LaPorte, St. Joseph, and Vanderburgh Counties. On August 10, 1979, the Technical Secretary of the Indiana Air Pollution Control Board supplemented this

original request for an extension in Dearborn, Dubois, Clark, Wayne, Marion, Lake and Vigo Counties. Portions of all these counties have been designated as not attaining the secondary particulate NAAQS.

In order to receive an extension, a State must satisfy the requirements of 40 CFR 51.31. These requirements include a showing that attainment will require emission reductions greater than those that would result from application of reasonably available control technology as well as a showing that notice has been given to States which adjoin any air quality control region which is the subject of an extension request. As discussed below, the State has not yet satisfied these requirements.

The Marion, Lake, and Clark Counties, the State has not submitted technical support or documentation to satisfy the regulatory requirements. Without technical support, USEPA cannot evaluate whether attainment in these counties will require emission reductions greater than those that would result from the application of RACT. The State can remedy this deficiency by submitting adequate technical support during the comment period in this notice. Although technical support was provided for Dearborn, Dubois, Vigo, and Wayne Counties in the SIP submittal, the State indicates in Executive Summaries that analysis of this support demonstrates that attainment of the secondary standard can be achieved using RACT. USEPA is aware, however, that the State has reassessed what constitutes RACT for particulate sources. This reassessment may result in a determination that attainment will require emission reductions greater than those that would result from the application of RACT. Therefore, during the comment period announced in this Notice, the State must (1) specify what Indiana has defined as RACT for the affected source categories and (2) demonstrate that RACT alone will not achieve attainment of the secondary standards. On September 10, 1979 and January 29, 1980, the State submitted technical support to justify the extension in Vanderburgh, LaPorte, St. Joseph, and Howard Counties. USEPA proposes to approve the requests for extension in these four counties since USEPA's review of the

technical support indicates that the regulatory requirements are satisfied. USEPA further proposes to approve the other requests for eighteen month extensions of the January 1, 1979 deadline of the SIP revision and the July 1, 1979 deadline for USEPA approval if the State submits the missing documentation cited above during the thirty day Comment period on this Notice. Approval of the State's request would require the State to submit strategies to attain the secondary standards for these areas by July 1, 1980.

To remedy its particulate nonattainment problem the State of Indiana has proposed a control strategy which consists of a revision to Air Pollution Control (APC) Regulation 3 containing visible emission limitations, a new Regulation APC 9 regulating coke oven batteries, a new Regulation APC 23 containing emission limitations for stationary sources of particulates, and reliance on existing Regulations APC 20, APC 4R, APC 5, APC 6, and APC 7. A detailed discussion of each proposed SIP revision and USEPA proposed rulemaking is contained below. This Notice of Proposed Rulemaking does not address whether this requirement for RACT for the iron and steel industry has been met. This issue will be the subject of a future Federal Register notice.

The Indiana Air Pollution Control Division of the State Board of Health claims that the application of these new and revised air pollution control regulations will provide for attainment of the primary and secondary particulate NAAQS in Vigo, Wayne, Dubois and Dearborn Counties by December 31, 1982. USEPA has noted the following deficiencies with the attainment demonstration portion of the Indiana submittal:

(1) The attainment demonstration claims emission reduction credits for strategies which are either not yet included in the SIP or not clearly enforceable under the SIP. Although the attainment demonstration based on the control strategies appears adequate, the regulations incorporating the control strategies have serious deficiencies which will be discussed below in the portion of this notice addressing the regulations. The Indiana submittal also claims emission reduction credits for area source controls but the proposed revision does not identify how these reductions will be achieved. Further,

although emission reduction credits are taken by the State based on a projected decline in coal usage as an industrial fuel for small uncontrolled process sources, the State does not document the basis for the projected decline. These credits cannot be claimed unless they are documented and fully enforceable regulations appear in the SIP ensuring that reductions will occur.

(2) To the extent that the attainment demonstrations depend upon air quality modeling analyses, the following deficiencies must be clarified or corrected. First, the total concentration due to both area and point sources that is predicted at a given receptor does not equal the number obtained when the area source impact is added to the point source impact at that receptor. This discrepancy in the modeling results must be resolved. Secondly, the parameters that are used to: (a) calibrate the annual model; (b) convert from arithmetic to geometric annual mean concentrations; and (c) convert from annual to 24-hour concentrations must be identified. The State must specify at each monitor and receptor location the standard geometric deviation obtained from the measured air quality data and a statistical parameter, z, that signifies the number of standard deviations between the geometric mean and the second highest 24-hour concentration. Third, the grid resolution in the maximum impact areas must be increased. This is necessary since the modeled ground-level concentrations in the vicinity of the location of maximum impact can change very rapidly. For example, the modeled concentration at half of the distance to the point of maximum impact may be two orders of magnitude less than the maximum predicted concentration. Finally, the area source grid size applied in the modeling analyses should be compared to the actual area source size. This demonstration is necessary to show that the emissions from the area sources have not been diluted by spreading the emissions over an unrealistictly larger area. Such a dilution would serve to decrease the predicted impact from area sources. The State must submit a comparison of area source grid size with the actual area source size.

USEPA proposes to approve the Indiana particulate attainment demonstrations for Wayne, DuBois, and Dearborn Counties if the noted deficiencies are corrected prior to USEPA final rulemaking. USEPA expects the State to correct the deficiencies as quickly as possible where the State is unable to make the corrections during the comment period and where the deficiencies are relatively minor, USEPA will conditionally approve them if the appropriate State official makes a commitment to correct the deficiencies according to a schedule negotiated between the State and the USEPA Regional Office during the comment period announced in this notice.

Regulation APC 3—Visible Emission Limitations

Indiana has submitted a proposed revision to Regulation APC 3 which establishes standards for visible emissions from the operation of any facility in the State and contains provisions for temporary exemptions from these standards. USEPA has reviewed this regulation and with the exception of those portions of it which incorporate the Federal New Source Performance Standards for visible emissions into Indiana law proposes to disapprove the regulation for the following reasons:

1. The proposed regulation creates limitations for visible emissions from a stack. It further establishes two categories of particulate emissions from a stack, designated as continuous and intermittent emissions. The definitions of continuous and intermittent emissions are contained in proposed Regulation APC 1. Different methods of measuring visible emissions are established depending upon whether the emissions are defined as continuous or intermittent.

Continuous emissions are defined in APC 1 as those emissions which are constantly emitted by a facility during the operation of the facility and which are not intermittent in nature. Intermittent emissions are defined as particulate emissions generated for intervals of less than six consecutive minutes. Because the definitions are based on the duration of emissions from a stack

or vent rather than on the duration of a particular operation, the same source could be both a continuous and intermittent emitter. USEPA believes that the lack of clarity in the definitions of continuous and intermittent emissions renders this regulation unenforceable because it would be impossible to know which measurement method was appropriate. Therefore, before this regulation is approvable, the definitions of continuous and intermittent emissions in Regulation APC 1 must be modified to ensure that the selection of the proper measurement method is based on the operation causing the emissions and not the duration of emissions from a stack or vent.

2. Regulation APC 3 establishes visible emission limits for continuous and intermittent emissions from a stack. Existing sources in nonattainment areas of Dearborn, DuBois, Vigo, and Wayne Counties must meet a limitation of 30% opacity. Sources in nonattainment areas in Lake, Clark, Marion, Howard, La Porte, St. Joseph, and Vanderburgh Counties, however, need only meet the less restrictive 40% opacity limitation. The State has not provided technical support to demonstrate that a 40% visible emission limitation in the nonattainment counties of Lake, Clark, Marion, Howard, LaPorte, St. Joseph, and Vanderburgh represents reasonable available control technology.

3. Regulation APC 3 does not contain opacity limitations for non-stack sources of visible emissions. In Section 3(a)(1)(C), the Regulation requires emissions from non-stack sources or facilities in attainment areas and in the nonattainment areas of Lake, Clark, Marion, Howard, La Porte, St. Joseph, and Vanderburgh to be controlled by the requirements in existing Regulation APC 20. Existing Regulation APC 20 specifies maximum allowable ambient concentrations of fugitive dust. No provision is made in Regulation APC 3 to regulate non-stack sources of visible emissions in the nonattainment areas of Dearborn, Dubois, Vigo and Wayne

Counties. Non-stack sources of visible emissions are currently regulated under existing Regulation APC 3, a part of the federally approved Indiana SIP. The proposed use of Regulation APC 20 to control these emissions in attainment areas and specified nonattainment areas and the failure to include any controls for non-stack sources in four nonattainment counties represents a significant relaxation from the current federally approved SIP. In approving portions of Regulation APC 20 as part of the federally approved SIP, on October 28, 1975 (40 FR 50032), USEPA advised the State of its reservations concerning the vagueness and ambiguity of the regulation. Since that time, USEPA has found that Regulation APC 20 is largely unenforceable. Therefore, USEPA will be proposing to declare Regulation APC 20 deficient pursuant to sections 110(a)(2)(H)(ii) and 110(c)(1)(C) of the Clean Air Act in a separate Federal Register action to be issued shortly. USEPA cannot approve a relaxation from the existing federally approved SIP unless the relaxation would not interfere with the attainment or maintenance of the NAAQS. The State has not demonstrated in its submittal that the proposed reliance on Regulation APC 20 which represents a relaxation of the restrictions on visible emissions from nonstack sources will not interfere with the attainment or maintenance of the National Ambient Air Quality Standards. USEPA must therefore disapprove Section 3(a)(1)(C) of the regulation. In order to render this regulation approvable, the State must make such an attainment demonstration. In the absence of such a demonstration, the State must remove Section 3(a)(1)(C) from Regulation APC 3 and promulgate a substitute for controlling visible emissions from all nonstack sources.

4. Sections 3(a)(1)(D) and (a)(2)(C) require all fugitive dust emissions in both attainment and nonattainment areas to be controlled under the requirements of Regulation APC 20. As discussed above, USEPA has determined that Regulation APC 20 is unenforceable and will be issuing a *Federal Register* Notice of SIP Deficiency

shortly. In its compliance modeling analysis, the State did not claim any emission reduction credits for the use of Regulation APC 20. In the submittal, the State has indicated that additional area source studies are being done in any area in which the State cannot demonstrate attainment of either the primary or the secondary standards. If the results of these further studies indicate that the State must control fugitive dust in order to achieve the standards, the State will have to make a commitment to develop strategies and to implement regulations for controlling fugitive dust so as to attain and maintain the NAAQS.

5. The proposed regulation provides temporary exemptions from the general visible emission limitations in Regulation APC 3 for boilers during startup, shutdown, and cleaning, and authorizes the Indiana Air Pollution Control Board (IAPCB) to grant special temporary exemptions of the same type and duration for other facilities. Although Section 4(a) of the regulation permits the applicable opacity limit in Section 3(a) to be exceeded during the building of a new fire in a boiler or the shutting down of a boiler, visible emissions cannot exceed 60 percent opacity and emissions in excess of the applicable opacity limit cannot continue for more than ten continuous minutes on one occasion in any 24-hour period. Similarly, Section 4(b) allows visible emissions to exceed the applicable opacity limit in Section 3(a) during the cleaning of a boiler or the blowing of tubes but restricts the visible emissions to 60 percent opacity and states that emissions in excess of the applicable opacity limit cannot continue for more than five continuous minutes on one occassion in any 60-minute period. Further, such emissions are not permitted on more than three occasions in any 12-hour period.

USEPA believes that Sections 4(a) and (b) are unenforceable since the regulation neither defines "continuous minutes" nor provides a computation method or procedure. Therefore, a possible interpretation of the provisions is that a source can exceed the applicable

opacity limit in Section 4(a) for up to nine continuous minutes on numerous occasions in any 24-hour period and still not be in violation of the regulation and that a source can exceed the applicable opacity limit in Section 4(b) for up to four continuous minutes on numerous occasions in any 60-minute period and still not be in violation of the regulation. In order to approve this provision, USEPA could permit only one exemption from the applicable visible emission standard which would last for ten or less minutes in any 24-hour period. Any second exceedance of the standard would be considered a violation of the provision whether or not the duration of the exceedance was equal to or longer than ten minutes. Further, any exceedance of the 60 percent opacity limit would constitute a violation of the regulation. The exemption in Section 4(b) would have to be similarly treated.

6. According to Section 2(a) of the regulation, APC 3 applies to all visible emissions emitted by or from any facility or source except those sources or facilities for which specific limitations are established by Regulations APC 9, APC 20, or APC 23. USEPA proposes to disapprove Section 2(a) of this regulation due to the fact that this provision renders the regulation vague in its application. In order to be approvable and to eliminate the enforceability problem, the regulation must clearly specify that it applies to sources which are not subject to specific visible emissions limitations imposed by other regulations.

Except for the portions of proposed Regulation APC 3 which incorporate the Federal New Source Performance Standards for visible emissions into Indiana law, USEPA proposes to disapprove proposed Regulation APC 3 because of the deficiencies discussed above. A disapproval of proposed Regulation APC 3 would not necessarily result, however, in an overall imposition of the growth restrictions of section 110(a)(2)(1) of the Clean Air Act in all particulate nonattainment areas. Pursuant to section 110(d) of the Act. Indiana's regulation APC 3,

as federally approved on October 28, 1975, would remain the effective rule. USEPA believes that, for sources other than iron and steel, the current, federally approved Regulation APC 3 satisfies the requirements of the Act for an approvable Part D SIP. USEPA will propose rulemaking on the particulate control strategy for iron and steel sources in a future Notice of Proposed Rulemaking. Therefore, if proposed Regulation APC 3 is disapproved, the growth restrictions would continue to apply only in those nonattainment areas containing iron and steel sources.

For Part D purposes, USEPA would continue to enforce Regulation APC 3 as federally approved on October 28, 1975. That rule applies to both continuous and intermittent sources of visible emissions. Consistent with traditional application of that rule, opacities would be measured according to the observation techniques specified by USEPA Method 9, 40 CFR Part 60, Appendix A although averaging of consecutive observations would not be used for intermittent sources.

Regulation APC 9—Coke Oven Batteries

Indiana has submitted a new Regulation APC 9 which establishes emission limitations and inspection procedures for by product coke oven batteries. USEPA will discuss this regulation and USEPA's proposed action on APC–9 in a separate Notice of Proposed Rulemaking concerning iron and steel process sources.

Regulation APC 23—Stationary Source Particulate Emission Limitations

The State of Indiana has proposed a new Regulation APC 23 which contains particulate emission limitations for all stack and non-stack facilities having a potential to emit 100 tons of particulate matter per year or actual particulate emissions of 10 tons per year which are located in Dearborn, Dubois, and Wayne Counties and for all Shelby County facilities producing fiber glass insulation by the superfine process with these potential or actual emissions.

The regulation specifies emission limitations for specific source categories and a general emission limitation for facilities not covered by any specific limitation. APC 23 does not apply to the primary nonattainment areas of Lake, Marion, Vigo and LaPorte Counties.

If an emission limitation contained in Regulation APC 23 is not adequate to assure the attainment or maintenance of the particulate ambient air quality standard or to satisfy a Prevention of Significant Deterioration requirement under Part C of the Clean Air Act, Section 3(q) of the regulation provides for the establishment of a more stringent emission limitation in permits issued in accordance with proposed Regulation APC 19. Similarly, if an emission limitation in the regulation causes severe economic hardship for an individual source, Section 3(s) of the regulation allows the Indiana Air Pollution Control Board to establish a less restrictive limitation in a permit issued in accordance with proposed Regulation APC 19 as long as the less restrictive limitation will guarantee the attainment and maintenance of the particulate ambient air quality standards and protection of the PSD increment. Any change in an emission limitation specified in Regulation APC 23 must be submitted to USEPA as a revision to the federally approved State Implementation Plan according to section 8 of the regulation.

Emission limitations established for existing sources pursuant to Section 3(q) are contained in an appendix to the regulation. As permits are issued pursuant to this regulation by the Indiana Air Pollution Control Board which incorporate the emission limitations in Appendix A, the emission limitation in the permit will supersede and replace the corresponding limitation in the appendix.

USEPA has reviewed Regulation APC 23 and has determined that it contains the following deficiencies:

1. The applicability section of this regulation contains a deficiency which must be corrected. Section 2(b) of the regulation states that particulate emissions from stationary facilities located in attainment areas and from

stationary facilities located in the nonattainment areas of Dearborn, Dubois, and Wayne Counties which are not specifically limited by emission limitations in Appendix A are limited by the applicable Regulations APC 3, APC 4R, APC 5, APC 6, APC 7, or APC 9. Thus, all stationary sources located in Dearborn, Dubois and Wayne Counties which are not covered under Appendix A are not covered by Regulation APC 23.

USEPA believes that it is counter to the intention of the IAPCB in adopting the regulation to exclude sources in these four counties which do not have more stringent emission limitations in Appendix A from the general emission limitations in Section 3 of the regulation. USEPA proposes to conditionally approve the regulation if the State makes a commitment to correct this technical error on a schedule to be negotiated between the State and the USEPA Regional Office during the comment period announced in this Notice. If USEPA has incorrectly interpreted the intent of the IAPCB concerning this provision, then the State must notify the USEPA during the thirty day comment period announced in this notice and demonstrate that the emission limitations contained in Regulation APC 3, APC 4R, APC 5, APC 6, APC 7 or APC 9 as applied to the sources in these four counties not covered by Appendix A are adequate to demonstrate the attainment and maintenance of the NAAQS.

2. Section 5(a) of the regulation contains a test method for determining compliance with the regulation by stack sources of particulate matter. The regulation does not contain a test method for determining compliance with the regulation by nonstack sources of particulate matter. Such a test method must include, at a minimum, specific methods for determining isokinetically the concentration of particulate matter in the emitted stream and specific method(s) for determining the flow rate of the emitted stream(s). The State must make a commitment either to include an enforceable test method or exceptable opacity limitations for determining compliance of non-stack

sources with the regulation during the thirty day comment period announced in this Notice.

3. The emission limitations contained in Appendix A of this regulation are based on units of mass per time while the general emission limits contained in section 3 of the regulation are listed in grains per dry standard cubic foot or pounds per ton, or in pounds per million Btu. In order to evaluate the level of control achieved with the use of the emission limitations in the appendix, the allowable emissions for sources covered by the appendix must be converted into grains per dry standard cubic feet or pounds per tons, or pounds per million Btu. USEPA proposes to approve this provision if the State corrects this deficiency within the thirty day comment period announced in this Notice.

4. Shelby County Indiana has been designated as an attainment county for particulates, The emission limitations contained in Appendix A of this regulation for facilities of the Knauf Fiber Glass Company in Shelby County are a relaxation for the emission limitations contained in existing Regulation APC 5 of the current federally approved State Implementation Plan. In order to approve a relaxation from the current federally approved SIP, a State must submit technical support demonstrating that the National Ambient Air Quality Standards will be attained and maintained with the relaxation. Indiana did not submit technical support for this relaxation and the applicable increment to prevent significant deterioration will not be violated. USEPA proposes to approve the emission limitation in Appendix A for the Knauf Fiber Glass Company if during the thirty day comment period announced in this Notice the State submits technical support demonstrating that the revised emission limitation will attain and maintain NAAQS and protect applicable PSD increments.

USEPA proposes to approve Regulation APC 23 as a revision to the Indiana SIP if the above deficiencies are corrected prior to USEPA final rulemaking or to condi-

tionally approve the regulation if the State makes firm assurances that the deficiencies will be corrected prior to USEPA final rulemaking or to conditionally approve the regulation if the State makes firm assurances that the deficiencies will be corrected according to the schedules negotiated between the State and the USEPA Regional Office during the thirty day comment period announced in this Notice.

Sulfur Dioxide

As described in the October 5, 1978 Federal Register (43 FR 46008), Marion County, Vigo County and portions of Lake, LaPorte and Wayne Counties are nonattainment areas for sulfur dioxide.

To attain and maintain the sulfur dioxide NAAQS in nonattainment areas, as required by Part D of the Act, Indiana submitted revised Regulation APC 13 which restricts SO_2 emmissions from sources with a potential to emit 22.3 metric tons of sulfur dioxide per year (25 tons SO_2 per year) or 4.5 kilograms of SO_2 per hour (10 lb. SO_2 per hour). The emission limitations contained in Regulation APC 13 apply statewide. Where computer studies showed that specific sources in nonattainment areas required more stringent controls, site specific emission limitations were developed and adopted by the IAPCB in an Appendix to Regulation APC 13. As State operating permits incorporating these emission limits are issued pursuant to Regulation APC 19, the emission limitation in the permit will supercede and replace the corresponding limitation in the Appendix. Any change in an emission limitation specified in Regulation APC 13 or in Appendix A to Regulation APC 13 must be submitted to USEPA as a revision to the Federally approved State Implementation Plan.

By letter dated October 4, 1979, the State of Indiana informed USEPA that it intended to revise its SO_2 attainment strategy for Vigo County, and officially withdrew from the SIP the portions of APC 13 Appendix A which pertain to Vigo County sources. Therefore, USEPA will not propose rulemaking with respect to the adequacy of sulfur dioxide plan

for Vigo County at this time. Rulemaking on the Vigo County SO_2 plan will be proposed at a future date after the revisions to the strategy are incorporated into APC 13, adopted by the Indiana Air Pollution Control Board, and submitted to USEPA as a revision to the Indiana SIP. It should be noted that the Clean Air Act prohibitions against construction or modification of major SO_2 sources will continue to apply to Vigo County until a revised plan is approved by USEPA.

This Notice of Proposed Rulemaking first addressed deficiencies in the strategy for the State as a whole and then discusses deficiencies relative to specific nonattainment areas.

Section 5 of Regulation APC 13 specifies two test methods for determining compliance with the rule: a stack test carried out in accordance with 40 CFR Appendix A Method 6 or by average sulfur content of the fuel used over a 30 day period. USEPA is proposing to approve the stack test method. USEPA is proposing to disapprove the use of a 30 day averaging period because there is no demonstration that this method will protect the NAAQS for SO_2.

Section 7 contains compliance timetables for "all sources which are operating on the promulgation date of the regulation and which have been issued new emission limitations pursuant to Section 3(c)..." This compliance schedule requires compliance by October 31, 1981. Section 7 also provides that if compliance is not possible by October 31, 1981 the Indiana Pollution Control Board may grant an extension to no later than December 31, 1982.

Section 7 of APC–13 is deficient in that new compliance schedules can only be approved for sources which are subject to more stringent emission limitations as a result of the revised regulation. Sources for which this revised regulation represents a relaxation of the previous federally approved SIP cannot be given additional time to achieve compliance with the regulation (44 FR 20373). This deficiency must be corrected before USEPA can approve Section 7 of Regulation APC 13.

Jefferson County

The present designation of Jefferson County is unclassified. Appendix A to the revised Regulation APC 13 does not list any source specific emission limitations for Jefferson County. Therefore, large power plants in Jefferson County would be required to meet the general emission limitation of 6.0 lb. SO_2 per MmBtu in revised Regulation APC 13. The technical analysis for Jefferson County shows potential violations of the secondary NAAQS at the 6 lb/MBtu limitation. Also, Kentucky has initiated an action under Section 126 of the Act alleging that sources located in Jefferson County Indiana are causing violations of the SO_2 NAAQS in Kentucky. Before USEPA can approve a control strategy for Jefferson County, the State must provide USEPA with a demonstration showing that the applicable emission limitations will protect the NAAQS in both Indiana and Kentucky. Therefore, USEPA proposes to disapprove APC 13 as it applies to Jefferson County.

This disapproval of APC 13 for Jefferson County would not result in the imposition of the industrial growth prohibitions contained in section 110(a)(2)(I) of the Act because Jefferson County is designated unclassifiable.

Wayne County

As previously discussed under APC 22, Indiana advised USEPA that the Indiana Air Pollution Control Board voted to recommend redesignating Wayne County as an attainment area for SO_2 and to delete the Wayne County SO_2 attainment strategy from the SIP. The Indiana submittal did not contain any technical support for the recommended designation change. Violations of the 24-hour and 3-hour National Ambient Air Quality Standards for SO_2 in the City of Richmond in Wayne County, Indiana Appear to be the result of emissions from a municipally owned electric generating station located within the city. The source in question is by far the largest emitter of sulfur dioxide in the County, and the plant is located downwind of the monitor which recorded the violations. Violations of the sulfur dioxide air quality standards have not been monitored in Wayne County since

1977. In that year the plant in question voluntarily reduced operations and began purchasing lower sulfur coal. It is likely that these operational changes have been responsible for the improved air quality in Wayne County, Indiana. However, APC 13 does not contain enforceable requirements that these operating practices remain in effect to ensure protection of air quality. Because of the lack of a control strategy for the Wayne County nonattainment area, and the lack of a demonstration that the revised regulation APC–13 will attain and maintain NAAQS in the vicinity of Richmond, Indiana, USEPA proposes Indiana's SO_2 plan for Wayne County as being inadequate to meet the requirements of Section 110 of the Clean Air Act.

Dearborn, Porter, and Warrick Counties

The present designation for Dearborn, Warrick, and a portion of Porter County is unclassifiable. Appendix A to the revised Regulation APC–13 does not list any source specific emission limitation for these counties, and therefore, all facilities with potential to emit 25 tons or more of SO_2 per year would be required to meet the general emission limitation of 6.0 lb. SO_2 per MBTU. This represents a relaxation from the emission limitations approved for these counties by the USEPA in 1973 and 1976. No technical support for this relaxation was provided nor did the State demonstrate that these revised regulations assure the attainment and maintenance of the NAAQS. Therefore, USEPA proposed to disapprove APC–13 as it applies to Dearborn, Warrick, and the portion of Porter County designated unclassifiable, unless the State submits during the public comment period adequate technical justification which demonstrates that the attainment and maintenance of the NAAQS for these three Counties is assured. Since these Counties are designated unclassifiable rather than nonattainment, a disapproval of APC–13 for these Counties would not result in the imposition of the industrial growth prohibition contained in section 110(a)(2)(I) of the Act.

Lake, Marion, and LaPorte Counties

Indiana did include sulfur dioxide control strategies for the nonattainment areas in Marion, Lake, and LaPorte Counties.

The modeling analyses submitted with Indiana's control strategies, however, were deficient since they failed to demonstrate that the sulfur dioxide strategies will attain and maintain the NAAQS. The deficiencies in the modeling analyses are as follows:

1) Background concentrations for all appropriate averaging periods (3-hour, 24-hour, and annual) did not appear to be determined and applied in the modeling analyses submitted for the nonattainment areas. This is necessary for determining whether the NAAQS are violated since two modeling analyses for a General Motors facility (Detroit Diesel Allison) showed either a potential violation of the 24-hour NAAQS or an actual violation at certain receptors. Background concentrations should be determined for all averaging periods in accordance with accepted methods. For initial guidance USEPA recommends the Guideline on Air Quality Models, EPA–450/2–78–027, April 1978.

2) The emission inventory for Marion County contained information from only six sources. Proper utilization of the model should include the use of a comprehensive emission inventory which includes all significant source contributions.

The Lake County emission inventory does not include the American Brick facility located in Munster, Indiana. Consequently, this facility was not included in the modeling study used to demonstrate attainment of the sulfur dioxide NAAQS in Lake County. An ambient air quality monitoring study of this facility, performed by USEPA in August, 1979, showed monitored violations of the 24-hour SO_2 NAAQS at sites located 0.6 kilometers from the facility. This facility must be included in the sulfur dioxide emission inventory for the attainment modeling analysis. If attainment cannot be demonstrated, then a control strategy must be developed which addresses the emissions from this source.

3) The modeling analysis for the Lake County nonattainment areas applied the NRC-delta T classification scheme in validating RAM. This is not a comprehensive treatment

of stability because it fails to address such factors as windspeed, insulation, and cloud cover. USEPA recommends the Pasquill-Gifford Turner Classification Scheme.

4) The analysis of Marion and LaPorte Counties did not contain documentation for the meteorological data base used in the modeling analysis. Such documentation should indicate the years of data used and location of meteorological stations used in the analysis.

5) No analysis was provided which demonstrated attainment and maintenance of the 3-hour secondary standard and the annual standard in the nonattainment areas.

6) The Marion County analysis lack documentation of the receptor network coverage and resolution, and a listing of high and second high concentrations of the critical days analyzed.

USEPA further proposes to disapprove APC–13 as it applies to Dearborn, Jefferson, Warrick, Wayne, and that portion of Porter County designated as "unclassifiable". USEPA can conditionally approve the control strategy demonstrations for Marion, Lake, and LaPorte Counties if the State of Indiana revises Section 5 of Regulation APC–13 as discussed above, and commits to correct the other noted deficiencies according to a schedule to be negotiated between the State and the USEPA Regional Office. This schedule must be negotiated during the comment period announced in this notice of proposed rulemaking. USEPA will propose rulemaking in the SO_2 plan for Vigo County upon formal State submittal of this portion of the SIP.

Ozone

Nine counties in Indiana have been designated as nonattainment areas for ozone. On January 26, 1979 (44 FR 8220), USEPA revised the National Ambient Air Quality Standard (NAAQS) from 0.08 parts per million (ppm) total photochemical oxidants for a maximum hourly average, to 0.12 ppm ozone for a maximum hourly average. Part D of the Clean Air Act requires States to revise their State Implementation Plans (SIP) for all areas that have not attained the National

Ambient Air Quality Standards. An adequate SIP for ozone is one which provides for sufficient control of volatile organic compounds (VOC) from stationary and mobile sources to provide for attainment of the standards by December 31, 1982. In cases where attainment by 1982 cannot be demonstrated despite the application of all reasonably available control measures, extensions of the attainment date may be granted to not later than December 31, 1987. For stationary sources in major urban areas of 200,000 or greater population, the plan must include, as a minimum, legally enforceable regulations reflecting the application of reasonably available control technology for those stationary sources for which USEPA has published a Control Techniques Guideline (CTG) by January 1978. For mobile sources, the plan must provide for expeditious implementation of reasonably available transportation control measures. In addition to these requirements, a SIP which provides for attainment of the ozone standard after December 31, 1982 must contain a specific schedule for the implementation of vehicle emission control inspection and maintenance (I/M) program.

The Indiana submittal contained sections on transportation control plans, vehicle inspection and maintenance and stationary source controls. The State of Indiana indicated in the proposed SIP revision of June 26, 1979 that because of the relaxation of the ozone standard (44 Fr 8220), additional time was required by the State to develop and adopt reasonably available technology regulations for existing sources of VOC. On February 11, 1980 the State submitted these regulations to USEPA. USEPA is now reviewing these regulations and will propose rulemaking on them at a later date. Until this review has been completed, USEPA cannot evaluate the amount of estimated emission reductions which can be expected from these sources. Therefore, USEPA can neither assess the adequacy of the Indiana attainment demonstration of the ozone National Ambient Air Quality Standard in those urban areas of 200,000 or greater population nor evaluate the reasonable further progress (RFP) schedules for these urbanized areas. USEPA has, however, reviewed the ozone submittal and sent a detailed letter to the

Director of the Indiana Air Pollution Control Division containing comments on the emission inventories and the demonstrations of attainment. This letter is available for review and copying at the addresses listed in the front of this Notice.

USEPA has stated its opinion (44 FR 20372) that the revision to the ozone standard does not affect the schedule for the submittal of revisions required under Part D of the Clean Air Act. Section 110(a)(1) of the Act requires that SIP revisions be submitted within nine months after a standard is revised. This refers only to SIP revisions legally required because of a revision to the standard (i.e. when a new pollutant becomes regulated under section 110 of the Act or where a standard is revised to be more stringent). Where a standard is relaxed, however, no SIP revision is required by law, since States are permitted under section 116 of the Act to have more stringent controls than necessary to meet minimum Federal requirements. Since it is the State's option whether to relax new requirements to the 0.12 ppm level, the State may determine its own schedule for accomplishing this. In any case, a SIP at least adequate to attain the 0.12 ppm ozone standard must be approved by USEPA prior to July 1, 1979 as a precondition for the construction or modification of any major source of VOC in a nonattainment area.

For a State Implementation Plan to be considered approvable, each individual element of the submittal must be approved as a revision to the SIP, and the revised SIP as a whole must satisfy the requirements of Part D of the Clean Air Act. USEPA has reviewed the ozone portion of the Indiana submittal and has determined that it contains omissions of such significance that USEPA cannot propose rulemaking on the adequacy of the entire ozone SIP at this time. Further, until USEPA has completed its review of the VOC stationary controls, it cannot propose rulemaking on the transportation plan component of the ozone submittal at this time. USEPA's review of the transportation plan submittal is below. USEPA has reviewed the inspection and maintenance component of the SIP submittal and proposes rulemaking on it as discussed below.

Transportation Plan Discussion

The proposed Indiana SIP revision on transportation discussed five urban areas. Transportation control plans have been submitted for the reduction of VOC emissions in Indianapolis, Fort Wayne, and in the interstate areas of Northwest Indiana, South Bend, and Louisville. A transportation control plan has been submitted for the reduction of carbon monoxide emissions in Indianapolis. A partial transportation control plan for the reduction of carbon monoxide emissions has been submitted for Northwest Indiana. Some of the transportation control plans submitted by the State contain measures designed to attain various ozone levels other than the current 0.12 ppm ozone standard. As previously noted, USEPA recently revised the National Ambient Air Quality Standard. An adequate SIP designed for an ozone level below 0.12 will be at least stringent enough to satisfy requirements for the 0.12 level. It is therefore the State's option whether to relax new requirements back to the 0.12 level or, pursuant to section 116 of the Act, to choose more stringent controls than are necessary to achieve the NAAQS. The use of more stringent controls may create emission offsets for future sources of hydrocarbons.

As discussed above, without an adequate attainment demonstration USEPA cannot evaluate the adequacy of the proposed emission reduction to be obtained from transportation control measures. The attainment demonstration consists of determining the overall amount of emission reduction necessary to attain the ozone standard. This reduction in emissions will come from control strategies affecting both stationary and mobile sources. Since the amount of the emission reductions from stationary sources cannot be determined due to the lack of VOC-RACT regulations, determinations of the adequacy of the mobile source reductions are not possible. Therefore, USEPA will not propose rulemaking on the transportation component of the Indiana ozone submittal at this time. Similarly, USEPA will not propose rulemaking at this time on the transportation component of the Indiana carbon monoxide submittal. Rulemaking cannot be proposed because the State has not

submitted a complete carbon monoxide strategy for Northwest Indiana. In addition, the State did not submit a complete carbon monoxide control strategy for Indianapolis until March 11, 1980. As previously stated, plan approval is a prerequisite for the construction or modification of any major source of VOC or carbon monoxide in a nonattainment area.

To assist Indiana and the lead local agencies in the preparation of the required submittals, USEPA has reviewed the transportation plans which were submitted against the requirements for an approvable nonattainment area SIP which appeared in the April 4, 1979 **Federal Register** (44 FR 20372), the "USEPA-USDOT Guideline for Air Quality-Transportation Plans" and the Office of Transportation and Land Use Policy "Checklist for Transportation SIP's". To be fully approvable, the transportation portion of a State Implementation Plan revision must contain the information listed in 1-8 below. Specific deficiencies which USEPA has noted in the preliminary submittal are discussed under each geographical area.

1. *Technical Assessments, Demonstrations of Attainment, and Reasonable Further Progress.* Pursuant to section 172(b)(3) of the Act, the SIP must include a program for selecting transportation measures to attain the emission reduction targets of the SIP. This program must include schedules for the expeditious implementation of already adopted transportation measures and schedules for the analysis and adoption of additional transportation measures. If attainment of the ozone and carbon monoxide standards by December 31, 1982 cannot be demonstrated, the SIP must contain a formal request for an extension of the statutory attainment deadline.

2. *Interagency Agreements and Assignments of Tasks.* Pursuant to section 174 of the Act, the State and elected officials of affected local governments must determine respective responsibilities of the state air pollution control agency, other state agencies, the lead local agencies, and local units of government. This determination must identify responsibilities for strategy evaluation, adoption, implementation and

enforcement and identify procedures and criteria for determination of consistency conformity of transportation plans and projects with the SIP.

3. *Analysis of Alternatives.* Pursuant to section 172(b)(2) of the Act, all reasonably available transportation measures must be evaluated and considered for implementation. At a minimum, the strategies listed in section 108(f) of the Act must be considered for each nonattainment area needing transportation related emission reductions. The SIP submittal must also contain a commitment by the Metropolitan Planning Organizations (MPO's) to justify any decision not to adopt a strategy listed in secton 108(F) of the Act.

4. *Implementor Commitments.* Pursuant to section 172(b)(10) of the Act, the SIP must include written evidence that the state and other governmental bodies have adopted the necessary requirements in legally enforceable form. Further, the SIP must contain commitments to implement and enforce the SIP strategies. Areas needing an extension beyond 1982 for attainment of CO or 03 standards must also commit to meeting basic transportation needs.

5. *Financial and Manpower Resources.* Pursuant to section 172(b)(7) of the Act, the SIP must identify the fiscal and manpower resources necessary to carry out the plan provisions.

6. *Reporting of Progress.* Pursuant to section 172(b)(5) of the Act, the SIP must contain procedures and schedules for periodic monitoring of progress in the implementation of strategies and in the achievement of annual emission reductions. Section 176 requires a lead local agency determination that its plans and programs conform with the revised SIP.

7. *Impacts of Plan Provisions.* Pursuant to section 172(b)(8) of the Act, the SIP must identify and analyze the air quality, health, welfare, economic, energy and social effects of the plan provisions and the alternatives considered.

8. *Public Participation.* Pursuant to section 172(b)(9) of the Act, the SIP must contain evidence of public, local government, and State legislative involvement and consultation regarding the planning process and proposed strategies.

Additional guidance material requires the documentation of a continuous public education program in each nonattainment area.

A discussion of USEPA's review of each of the five transportation control plans follows. The discussion highlights those elements of the plans which satisfy the requirements outlined above and those elements of the plans which are deficient and must be corrected.

Northwestern Indiana

The transportation plan for Northwestern Indiana was prepared by the Northwestern Indiana Regional Planning Commission (NIRPC) which has been designated pursuant to section 174 of the Clean Air Act as the lead local agency for coordinating, developing, and implementing the control measures in the plan.

The transportation plan contains measures designed to attain and maintain the National Ambient Air Quality Standards for ozone and carbon monoxide in Lake and Porter Counties. The submittal addresses the revised ozone standard of 0.12 ppm. A discussion of USEPA's review follows:

1. Analysis of Alternatives. NIRPC has made a commitment to carry out a detailed analysis of alternative transportation control measures by July 1980. A timetable identifying interim dates for the completion of the analyses must be included in the submittal. Such a schedule was approved in USEPA's grant to NIRPC under section 175 of the Clean Air Act. That schedule or a similar schedule should be submitted as part of the SIP revision.

2. Financial and Manpower Resources. Although specific transportation projects have been identified in the submittal for obtaining carbon monoxide and hydrocarbon emission reductions, the submittal does not identify the process by which the projects will be funded.

A schedule for the implementation of transportation control measures must be submitted identifying, at a minimum, when the projects will be included in the annual element of the region's transportation improvement pro-

gram; when the project will be included in a multi-year Statewide program, if necessary; and when the project will be included in the Statewide Section 105 program under the Federal Air to Highway Act if these funds are to be used in the project.

3. Public Participation. The Northwest Indiana portion of the Indiana SIP revision indicates that NIRPC has actively involved the public and local officials in the transportation-air quality planning process through its committee structure, public meetings and newsletters. In a grant to NIRPC under section 175 of the Clean Air Act, NIRPC identified additional public information activities it will be performing. The SIP submittal should include a schedule for the undertaking of these additional public information activities.

4. Reasonable Further Progress—CO. NIRPC and key implementors submitted resolutions in the SIP revision committing to specific annual mobile source emission reduction targets. Additional information is required, however, to assure that NIRPC achieves reasonable further progress in eliminating monitored and projected "hot spot" violations of the carbon monoxide NAAQS. To assure attainment of the carbon monoxide standard as expeditiously as practicable, NIRPC must specifically identify in the SIP submittal all areas needing "hot spot" strategies to achieve attainment, and provide a schedule for eliminating violations at these specific hot spots.

5. Reporting of Progress. As discussed above, NIRPC and other key implementors have made a firm commitment to specific annual reduction targets for carbon monoxide and hydrocarbon emissions in order to satisfy the statutory requirement for reasonable further progress. To assure that emission reductions achieve the reasonable further progress line for mobile sources, NIRPC must identify a mechanism for annually monitoring, measuring, and reporting emission reductions from current and future TSM/TIP projects to the Indiana Air Pollution Control Division.

6. Impacts of Plan Revision. The submittal for Northwest Indiana does not adequately identify and analyze the air quality, health welfare, economic, energy and social effects of the plan provisions and the alternatives considered. NIRPC must submit a detailed schedule for completing the impact analysis of the strategies considered for implementation.

7. Technical Assessments. In order to demonstrate attainment of the NAAQS and to monitor Reasonable Future Progress, NIRPC must submit a description of the analytical techniques which have been used and will be used for evaluating the air quality impacts of transportation projects.

8. Strategies for Demonstrating attainment. NIRPC included the following table in the submittal identifying those strategies contained in section 108 of the Clean Air Act which have been implemented, adopted but not yet implemented, scheduled for study, and determined not to be feasible. Although a determination cannot be made if these adopted strategies alone are sufficient to demonstrate attainment of the standards, the strategies identified in the submittal are approvable.

9. Commit to Basic Transportation Needs. Through policy resolutions by the Transit Authorities there is evidence of Northwest Indiana's effort to meet basic transportation needs.

Fort Wayne

The transportation plan for Ft. Wayne was prepared by the Northwestern Indiana Regional Coordinating Counsel (NIRCC) which has been designated pursuant to section 174 of the Clean Air Act as the lead local agency for coordinating, developing, and implementing the control measures in the plan.

The transportation plan contains measures designed to attain and maintain the National Ambient Air Quality Standards for ozone in the Ft. Wayne urbanized area. The

Status of Section 108 Strategies in Northwest Indiana

Strategies	Adopted and implemented	Adopted and not yet implemented	Scheduled for study	Determined not to be feasible
Inspection/Maintenance Transit Operations	—	X	—	—
Service improvement	X	X	X	—
Service expansion	X	—	X	—
Kiss-Ride facilities	—	—	X	—
Pan-Transit	—	—	X	—
Carpooling and Vanpooling:				
Areawide	—	—	X	—
Employer specific	X	—	X	—
Parking Management:				
On-street parking	X	—	X	—
Fringe parking	—	—	X	—
Other	—	—	X	—
Traffic Flow improvement:				
Reverse lanes	X	X	X	—
Driver advisory system	—	—	—	X
Ramp control	—	—	X	—
Widening	X	X	X	—
Alinement	X	X	X	—
Signal progression	—	—	X	—
Traffic actuated	—	—	X	—
One-way streets	—	X	X	—
Pedestrian control	—	—	X	—
Computerized signal system	—	—	X	—
Limit Portions of Road Surfaces:				
Separate roadbeds	—	—	—	X
Contra-flow lanes	—	—	—	X
By-pass lanes on entrance ramps	—	—	—	X
Exclusive lanes upstream	—	—	—	X
Continuous exclusive lanes	—	—	—	X
Work Schedules:				
Staggered hours	—	—	X	—
4 day work week	—	—	X	—
Road User Charges:				
Tolls	—	—	—	X
Parking taxes	—	—	X	—
Bicycle Storage Facilities	—	—	X	—
Retrofit:				
Light-duty vehicle	—	—	—	X
Heavy-duty vehicle	—	—	X	—
Control Fleet Vehicle Operations	—	—	—	X
Deferred Strategies:				
Control extreme cold start condition	—	—	—	—
Vapor emissions from fuel transfer	—	—	—	—
Limit portions of road surfaces for pedestrian	—	—	—	—
Limit portions of road surfaces for common carriers	—	—	—	—

plan was developed to attain an ozone standard of 0.08 ppm for a maximum hourly average. A discussion of USEPA's review follows:

1. Analysis of Alternatives. NIRCC has made a commitment to carry out a comprehensive analysis of alternative transportation control measures by July 1980. A timetable identifying interim dates for the completion of the analysis and for the adoption of reasonably available measures must be included in the submittal. Although such a schedule was approved in USEPA's grant to NIRCC under section 175 of the Clean Air Act, that schedule or a similar schedule must also be submitted as part of the SIP revision.

2. Financial and Manpower Resources. Although specific transportation projects have been identified in the submittal for future implementation, the plan for Ft. Wayne does not adequately identify the transportation programming process by which the projects will be funded. A schedule for the implementation of transportation control measures must be submitted identifying, at a minimum, when the projects will be included in the annual element of the region's transportation improvement program; when the project will be included in a multi-year Statewide program, if necessary; and when the project will be included in the Statewiude Section 105 program under the Federal Aid to Highway Act if these funds are to be used in the project.

In addition, NIRCC must provide a more detailed description of the financial and manpowr resources generally available for air quality-transportation planning activities. This description should include an estimate of staff time allocated to these activities and NIRCC funding requirements and sources of funding.

3. Technical Analyses, Reasonable Further Progress. In order to demonstrate attainment of the National Ambient Air Quality Standard for ozone and to monitor reasonable further progress, NIRCC must submit a description of the analytical techniques which have been used and will be used for evaluating the air quality impacts of transportation projects. This description should identify at a minimum

how NIRCC analyzes a project for air quality impacts based on changes in vehicle miles traveled, changes in vehicle trip length, changes in vehicle speed, and reductions of hydrocarbons in tons per year.

NIRCC has establishd an annual hydrocarbon emission reduction target of 0.006% from transportation strategies which will attain the former ozone standard of 0.08 ppm ozone by December 1987.

4. Impacts of Plan Provisions. The Ft. Wayne plan does not adequately identify and analyze the air quality, health, welfare, economic, energy and social effects of the plan provisions and the alternatives considered. NIRCC must submit a detailed schedule for completing the impact anal-yses of the alternatives contained in Section 108(f) of the Clean Air Act. Although such a schedule was approved in the grant to NIRCC under Section 175 of the Clean Air Act, that schedule or similar schedule must also be submitted as a SIP revision.

5. Implementor Commitments. The Ft. Wayne plan contains most of the planning commitments required by the guidance. The Urban Transportation Advisory Board of NIRCC has submitted an acceptable commitment dated November 6, 1978 to achieve the necessary emission reductions from the implementation of mobile source strategies. The submittal also includes commitments from other key implementors to utilize the planning process and to implement strategies necessary to achieve reasonable further progress.

6. Public Participation. Although NIRCC has submitted a description and a schedule for undertaking public education and information activities, this description and schedule must be more detailed.

7. Interagency Agreements and Assignment of Tasks, NIRCC has signed a memorandum of understanding with the Indiana Air Pollution Control Division outlining respective responsibilities and roles. This Memorandum of Understanding must be submitted as part of the SIP revision. In

addition, NIRCC must include in the submittal a description of the authority, organization, and goals of the Local Air Quality Advisory Committee.

8. Reporting of Progress. NIRCC has not satisfied the requirement of section 176(c) of the Clean Air Act that an annual determination be made that existing and future plans and programs of the lead local agency conform to the requirements of the Clean Air Act. NIRCC must submit a procedure for annually making this determination.

South Bend Interstate Area

The transportation plan for the South Bend Interstate area was prepared by the Michiana Area Council of Governments (MACOG) in conjunction with the Southwest Michigan Regional Planning Commission for the Nile, Michigan portion of the Interstate area. Although the planning process addresses the interstate area, hydrocarbon reduction strategies are proposed only for the Indiana portion of the interstate area. The plan was developed to attain an ozone standard of 0.10 ppm for a maximum hourly average. A discussion of USEPA's review follows:

1. Impacts of Plan Provisions. The submittal for South Bend does not adequately identify and analyze the air quality, health, welfare, economic, energy and social effect of the plan provisions and the alternatives considered. MACOG must submit a detailed schedule for completing the impact analyses of the strategies considered for implementation under section 108(f) of the Clean Air Act.

2. Public Participation. MACOG has not submitted a description of future public information and education activities. MACOG must submit a description of projected activities and a schedule for undertaking the activities.

3. Technical Assessments, Reasonable Further Progress. In order to demonstrate attainment of the NAAQS for ozone and to monitor reasonable further progress, MACOG must submit a description of the analytical techniques which have been used and which will be used for evaluating the air quality impact of transportation

projects. This description should identify, at a minimum, how MACOG analyzes a project for air quality impacts based on changes in vehicle miles traveled, changes in vehicle trip length, changes in vehicle speed, and reductions of hydrocarbons in tons per year.

MACOG must also submit projected annual hydrocarbon emission reductions from transportation activities so that the reasonable further progress line can be determined.

4. Reporting of Progress. To assure that hydrocarbon emission achieves the reasonable further progress line for mobile sources, MACOG must identify a mechanism for annually monitoring and reporting emission reductions from current and future TWM/TIP project to the Indiana Air Pollution Control Division.

5. Financial and Manpower Resources. Although specific transportation projects have been identified in the submittal for obtaining hydrocarbon emission reductions, the submittal does not identify the process by which the projects will be funded. A description of the project programming process must be included in the SIP submittal identifying a schedule for the following steps: Transportation Systems Management adoption, Transportation Improvement Plan adoption; and submittal of measures to the Indiana Highway Commission for State Approval and for securing necessary funds for project implementation.

6. Implementor Commitments. The commitment from MACOG's Policy Committee to achieve reasonable further progress and to utilize the planning process to attain the ozone standard in the South Bend Interstate Area by December 31, 1982 is approvable. MACOG, however, must further commit itself to obtain commitments to the specific strategies and the annual reduction target from those agencies and units of government which will be implementing the transportation strategies.

7. Interagency Agreements and Assignments of Tasks. MACOG has signed a memorandum of understanding with the Indiana Air Pollution Control Division outlining respective roles and responsibilities. This Memorandum of Understanding must be submitted as part of the SIP revision.

8. Strategies for Demonstrating Attainment. MACOG included the following table in the submittal identifying those strategies which have been adopted and which will be implemented in the future. USEPA believes these strategies are appropriate although a determination cannot be made at this time if these strategies will be adequate to demonstrate attainment. Further, although the submittal indicates that an extension to 1987 is necessary, this cannot be determined at this time.

As discussed previously, the NAAQS for ozone has been revised from 0.08 ppm photochemical oxidants on a maximum hourly average to 0.12 ppm ozone on a maximum hourly average. Therefore, an extension can be granted only if the strategy measures in the submittal are inadequate to demonstrate attainment of the 0.12 ppm ozone NAAQS by December 31, 1982. In order to obtain an extension, MACOG must demonstrate that the strategies chosen to attain the 0.10 level are inadequate to demonstrate attainment of the 0.12 standard by December 31, 1982.

City of Elkhart and Elkhart County—SIP Strategy Description of Adopted But Not Yet Implemented Measures

Project	HC reductions (tons/day)
1982 Credits:	
Johnson Cone Corridor (3 Projects)	0.0299
Four Intersections: Bristol Street-Channelization; Benham-Hively; Prairie-Hively; and Goshen-Toledo Road	0.0256
Lexington—From U.S. 20 to Napanee	0.0115
New Bus Service	0.0045
1987 Credits:	
U.S. 20 Bypass (2 Projects)	0.0303
Northern County Bypass	0.0059
State Route 19 (From S.R. 112-Mich State Line)	0.0046

Louisville Interstate Area

The transportation plan for the Indiana portion of the Louisville interstate area was prepared by the Kentuckiana Regional Planning and Development Agency (KIPDA) which has been designated pursuant to section 174 of the Clean Air Act as the lead local agency for coordinating, developing, and implementing the control measures in the plan. Since this is

not only an interstate area but also an inter-regional area for USEPA, a policy decision was made that the Kentucky Department of Natural Resources (KDNR) and the Region IV office of the USEPA have primary responsibility for the Louisville area.

The transportation plan contains measures designed to attain and maintain the National Ambient Air Quality Standards for ozone in Indiana's Clark and Floyd Counties. The plan was developed to attain an ozone standard of 0.08 ppm for a maximum hourly average.

A discussion of USEPA's review follows:

1. Public Participation. Although KIPDA has submitted a description and schedule for undertaking public education and information activities, this description and schedule must be more detailed.

2. Implementor Commitments. The submittal included a KIPDA Policy Committee commitment dated December 7, 1978 and a Transit Authority of River City Commitment dated September 19, 1978. The commitments are to utilize the planning process outlined in the SIP revisions and to achieve reasonable further progress. The submittal does not, however, separate the total percentage of hydrocarbon emission reduction necessary to attain the standard into a transportation related component and a stationary source component. Once Indiana has adopted stationary source VOC regulations and an attainment strategy which specifies the quantity of emission reductions needed from mobile sources, KIPDA must commit itself to obtain the reductions in the transportation component. KIPDA must also obtain commitments from key implementors of the transportation strategies to achieve mobile source emission reductions which will demonstrate reasonable further progress.

3. Technical Assessments. Demonstrations of Attainment. The transportation plan for the Indiana portion of the Louisville interstate area predicts that additional strategies beyond those contained in this SIP revision will

be required to attain an 0.08 ppm ozone level. Therefore, KIPDA is requesting an extension of the December 31, 1982 attainment date pursuant to section 172 of the Clean Air Act. KIPDA's planning process is designed to attain the standard by selecting additional strategies by July 1, 1980 for implementation after December 31, 1982. As discussed previously the NAAQS for ozone has been revised from 0.08 ppm photochemical oxidants on a maximum hourly average to 0.12 ppm ozone on a maximum hourly average. Therefore, an extension can be granted only if the strategy measures in the submittal are inadequate to demonstrate attainment of the 0.12 ppm ozone NAAQS by December 31, 1982. In order to grant an extension, KIPDA must submit a demonstration that the strategies chosen to attain an 0.08 ppm level are inadequate to demonstrate attainment of the 0.12 ppm ozone NAAQS by December 31, 1982. The following table outlines the projected emission reductions from each proposed strategy. USEPA believes that the proposed strategies are appropriate but cannot determine the adequacy of the projected emission reductions until USEPA completes its review of the VOC stationary source controls.

Indianapolis

The transportation plan for Indianapolis was prepared by the Indianapolis Department of Metropolitan Development (DMD) which has been designated pursuant to section 174 of the Clean Air Act as the lead local agency for coordinating, developing, and implementing the control measures in the plan. The transportation plan contains measures designated to attain and maintain an ozone level of 0.08 ppm hourly maximum average in Indianapolis.

Although portions of the Indianapolis area were designated as not attaining the carbon monoxide NAAQS, the submittal did not include either strategies for attaining the standard or technical analyses demonstrating attainment of the standard. Therefore, USEPA will not propose rulemaking at this time on either the carbon monoxide or on the ozone portion of the Indianapolis transportation control plan.

Emission Reductions From Proposed Strategies by County

Tons Per Year Reduction

Year	Jefferson (Kentucky)		Floyd (Indiana)		Clark (Indiana)	
	HC	CO	HC	CO	HC	CO
Metro Carpool Program:						
1982	77	563	4	42	15	100
1987	48	433	3	34	14	76
Improvement of Public Mass Transit:						
1982	168	1,230	—	—	—	—
1987	110	919	—	—	—	—
Highway Improvement Projects:						
1982	717	11,268	52	814	128	2,015
1987	590	10,232	45	784	105	1,818
Five Year TARC Five Year Improvement Program:						
1982	194	1,425	—	—	—	—
1987	127	1,065	—	—	—	—
Center City Tranportation Study:						
1982	305	1,879	—	—	—	—
1987	203	1,430	—	—	—	—
*Annual Element of TARC 5-Year Improvement Program:						
1982	21	157	—	—	—	—
1987	14	118	—	—	—	—
Long Range Bicycle Plan for Jefferson County:						
1982	4	32	—	—	—	—
1987	3	25	—	—	—	—
Implementation of all Programs (With TARC Annual Element Counted in its 5-Year Program:						
1982	1,465	16,398	56	856	143	2,115
1987	1,081	14,104	48	818	119	1,894
Total, All three Counties: *Year*—1982; *HC*—1,664; *CO*—19,369; *Year*—1987; *HC*—1,248; *CO*—16,816.						
Inspection Maintenance:						
1982	2,320	49,750	150	2,220	330	4,900
1987	3,760	41,950	250	1,900	510	6,610
Grand Total With I/M:						
1982	3,785	66,148	206	3,076	473	7,015
1987	4,841	56,054	298	2,718	629	8,504
Total, All three Counties: *Year*—1982; *HC*—4,464; *CO*—76,239; *Year*—1987; *HC*—5,768; *CO*—67,276.						

*The reductions resulting from the Tarc Annual Element are included in the TARC Five Year Plan and were not double counted in the totals.

1. Interagency Agreements and Assignments of Tasks. The submittal must include a new interagency agreement on the purpose, goals, authority and structure of the Air Quality Task Force of the Indianapolis Regional Transportation Council.

2. Reporting of Progress. In order to assure that future transportation planning is consistent with the require-

ments of the Clean Air Act, DMD must submit procedures for an annual determination of the consistency of its transportation programs with the State Implementation Plan.

3. Impacts of Plan Provisions. The submittal for Indianapolis does not adequately identify and analyze the air quality, health, welfare, economic, energy and social effects of the plan provisions and the alternatives considered. DMD must submit a detailed schedule for completing the impact analyses of the strategies considered for implementation.

4. Public Participation. Section 172(b)(9) of the Act requires evidence of local government involvement and consultation in the planning process. DMD has not satisfied this requirement and must submit a description of the process for including local governments in the transportation planning process.

5. Implementor Commitments. Although the DMD has submitted an adequate commitment to utilize the planning process and to attain reasonable future progress in hydrocarbon emission reductions, DMD must submit a similar commitment for carbon monoxide emission reductions. In addition, other implementors must submit commitments to achieve the reasonable further progress emission reduction targets and to utilize the transportion planning process.

6. Financial and Manpower Resources. Although DMD has submitted a flow chart describing its transportation planning and decision making process, the SIP must contain a more detailed description of the process by which projects are funded.

A schedule for the implementation of transportion control measures must be submitted identifying, at a minimum, when the projects will be included in the annual element of the region's transportation improvement pro-

gram; when the project will be included in a multiyear Statewide program, if necessary; and when the project will be included in the Statewide Section 105 program under the Federal Aid to Highway Act if these funds are to be used in the project.

In addition, DMD must include a list of potential funding sources for the strategies identified in the submittal. Evidence must be submitted by DMD that public transit has priority funding and project implementation.

7. Reporting of Progress. To assure that projected emission reductions achieve the reasonable further progress line for mobile sources, DMD must identify a mechanism for annually monitoring and reporting emission reductions from current and future TSM/TIP projects to the Indiana Air Pollution Control Division.

8. Analysis of Alternatives. DMD has made a commitment to carry out a comprehensive analysis of alternative transportation control measures by July 1980. A timetable identifying interim dates for the completion of the analysis of alternative measures contained in section 108 of the Clean Air Act and for the adoption of reasonably available measures must be included in the submittal.

9. Technical Analysis, Reasonable Further Progress. Although DMD has described the change in vehicle miles of travel, occupancy, trip length and emissions for potential strategies, similar information has not been submitted for strategies which have been adopted but are not yet implemented. This information must be provided.

10. Strategies for Demonstrating Attainment. DMD included the following table in the submittal identifying strategies which will be implemented or studies further. USEPA believes that the proposed strategies are appropriate but cannot determine the adequacy of the emission reductions until the State submits the VOC stationary source controls.

Status of Section 108 Transportation Measures in Indianapolis

Transportation Measures Implemented
Improved Public Transit
Traffic Flow
Park and Ride Fringe Parking

TCM's Committed and Programmed for Implementation

Areawide Car Pool Programs
Long Range Transit Improvements
Pedestrian Malls

TCM's Committed and Programmed for Further Studies

Employer Programs to Encourage Car and Van Pooling, Mass Transit, Bicycling, and Walking
Bicycle Lanes and Storage for Bicycles
Staggered Work Hours

TCM's Recommended for Further Studies

Motor Vehicle Emission Inspection and Maintenance Program
Parking Controls on Streets
Vapor Recovery
Exclusive Bus and Car Pool Lanes
Control on Extended Vehicle Idling
Road Pricing to Discourage Single Occupancy Automoile Trips
Alternative Fuels or Engines and Other Fleet Vehicle Controls

Vehicle Inspection and Maintenance

Section 172(b)(11) of the Act requires a specific schedule for the implementation of a vehicle emission control inspection and maintenance (I/M) program for those SIPs which demonstrate that attainment of the primary standards for carbon monoxide and/or ozone is not possible in an area prior to December 31, 1982, despite the implementation of all reasonable available emission control measures.

Pursuant to this requirement to this requirement, Indiana has submitted a plan for the implementation of an I/M program in the Indiana portion of the Chicago Metropolitan area (Lake and Porter Counties) and in the Indiana portion of the Louisville, Kentucky metropolitan area (Clark and Floyd Counties). Despite the absence of controls for stationary sources of VOC in the submittal making it impossible to assess the adequacy of the Indiana attainment demonstration, Indiana determined that these four counties require an I/M program on the basis of interstate data. An I/M program may also be necessary in Marion County if the Indiana attainment demonstration ultimately indicates that the NAAQS will not be achieved by December 31, 1982 despite the implementation of all reasonably available control measures.

The proposed Indiana I/M program described in the submittal is a contractor-operated emissions inspection with idle mode emissions testing. The program would involve the annual emissions inspection of all light duty vehicles, light duty trucks, and motorcycles. A vehicle failing the inspection would either be repaired or its registration would not be renewed. The program is scheduled to be fully operational by January, 1982. The Indiana submittal projects that by December 31, 1987 the I/M program will achieve a 28% hydrocarbon reduction and a 39% carbon monoxide reduction in Lake and Porter Counties, and a 26% hydrocarbon and 38% carbon monoxide reduction in Floyd and Clark Counties.

USEPA has reviewed the Indiana submittal on I/M for conformance with the requirements of the Clean Air Act and pertinent guidance. A discussion of that review follows:

1. Section 172(b)(10) of the Act requires inclusion in the SIP of written evidence that the State has adopted the necessary requirements by statute, regulations or other legally enforceable document and has committed itself to implement and enforce the elements of the plan. In his June 26, 1979 letter transmitting the Indiana submittal to USEPA, Governor Otis R. Bowen made a commitment to implement the I/M program under the authority of

Chapter 171 of the Indiana Air Pollution Control Law. Section 4(b) of this law authorizes the Indiana Air Pollution Control Board (IAPCB) to promulgate rules and regulations for the control of emissions from motor vehicles if the IAPCB forwards copies of such proposed regulations to each member of the Indiana General Assembly prior to the promulgation of the regulations. These regulations may "prescribe requirements for the installation and use of equipment designed to reduce or eliminate emissions and for the proper maintenance of such equipment and vehicles." In addition, Section 4(b) of the law provides for the suspension or cancellation of the vehicle registration if any "air pollution control system or mechanism which is solely to control air pollution of a motor vehicle" is not maintained in good working order or removed, dismantled, or otherwise caused to be inoperative.

As USEPA has previously indicated to the State of Indiana, it is not clear whether this statutory language, especially section 4b(b), is sufficient to enable Indiana to implement and enforce the kind of Inspection and Maintenance (I/M) program contemplated under the Clean Air Act. Specifically, USEPA questions whether the I/M program outlined in the submittal could be enforced under existing law against those vehicle owners whose vehicles fail the inspection test for reasons other than the failure of emission control devices which are used solely to control air pollution. For example, although motor vehicle emissions may increase significantly as a result of carburetor maladjustment, a carburetor is not solely an emission control device. A vehicle failing an inspection test because of a faulty carburetor adjustment would not be subjected to cancellation or suspension of its registration. Consequently, a program that restricts enforcement may not be able to achieve substantial emission reductions.

Additionally, USEPA is aware that the Chairperson of the Indiana House Public Safety Committee has requested the opinion of the Indiana Attorney General on various questions related to the implementation of the I/M pro-

gram outlined in the SIP submittal. Further, at a September 5, 1979, meeting, the Indiana Air Pollution Control Board authorized the Indiana Air Pollution Control Division to request an opinion from the Indiana Attorney General concerning the enforceability of an I/M program. No such opinion has been provided.

Because of these questions concerning Indiana's legal authority to fully implement and enforce the I/M program described in the SIP, USEPA cannot propose approval of Indiana's I/M program. In order for USEPA to approve Indiana's I/M program, the State must possess legal authority adequate to fully implement and enforce its I/M program. In addition, an approvable I/M program must demonstrate, pursuant to a July 17, 1978, memorandum by Assistant Administrator David Hawkins, that the program will reduce light duty vehicle exhaust emissions in 1987 by 25 percent as compared to the level of these emissions without the I/M program. Further, pursuant to section 172(b)(11) of the Act, an I/M submittal must contain both a legally enforceable schedule for the implementation of the plan and a commitment to the schedule by the State. The dates in the schedule must include the milestones listed in the July 17, 1978, memorandum by Assistant Administrator Hawkins. Both the requirement for a 25 percent emission reduction and the requirement for an acceptable implementation schedule must be satisfied within the scope of the State's legal authority.

Carbon Monoxide (CO)

Portions of Lake and Marion Counties have been designated as nonattainment for the carbon monoxide National Ambient Air Quality Standard. The proposed Indiana State Implementation Plan for carbon monoxide bases its control strategy for both nonattainment areas on transportation control strategies and emission reductions which will be attained through the Federal Motor Vechicle Control Program (FMVCP). The Indiana SIP contains separate submissions from the metropolitan planning organizations responsible for control strategy development in each nonattainment

area (Northwestern Indiana Regional Planning Commission (NIRPC) for Lake County, and City of Indianapolis Department of Metropolitan Development (IDMD) for Marion County).

USEPA has reviewed Indiana's SIP submission for carbon monoxide in each nonattainment area and noted the following deficiencies:

Lake County

Pursuant to section 172(b)(4) of the Clean Air Act as Amended 1977 (CAA), the SIP must include a comprehensive, accurate, current inventory of actual emissions from all sources of each pollutant. The submission for Lake County does not include a comprehensive emission inventory which includes emissions from both stationary and mobile sources.

In addition, the Lake County CO SIP does not include a determination of the level of control needed to demonstrate attainment of the NAAQS by 1982 or 1987, as required under section 1972(b)(8) of the Clean Air Act. The Lake County SIP also fails to identify the projected date for the attainment of the NAAQS. Thus, it is impossible to evaulate the necessity of an inspection/maintenance program for CO.

Further, the Lake County SIP does not make a demonstration of reasonable further progress (RFP) towards attainment of the NAAQS, as required under section 172(b)(3) of the Act. Although the control strategies to be used for control of CO emissions are the same as the strategies used for the control of hydrocarbon emissions and the attainment of the ozone NAAQS, a separate demonstration of attainment and RFP must be made for CO.

Marion County

The Marion County CO SIP does not make a demonstration of RFP towards attainment of the CO NAAQS as required under section 172(b)(3) of the Act. In addition, a separate demonstration of attainment of the NAAQS for CO is not made.

The SIP contains a 1977 emission inventory, which includes emissions from both stationary and mobile sources. Although

future mobile source emissions are considered, future growth in stationary source emissions are not included in the submittal. An adequate demonstration of RFP must include such growth.

USEPA will propose rulemaking on the adequacy of the CO SIP upon State submittal of the omitted stationary and mobile source elements described in this Notice of Proposed Rulemaking. It should be noted that plan approval is a prerequisite for construction of major sources of the nonattainment pollutant in designated nonattainment areas.

On March 11, 1980, the State submitted Marion County's Ozone and Carbon Monoxide Strategy as a revision to the SIP. This Plan is currently under review. Upon completion of this review USEPA will propose rulemaking on this submission.

II. General Requirements of Clean Air Act as Amended

The Indiana SIP revision submitted on June 26, 1979 addresses several requirements of the 1977 Amendments to the Clean Air Act that are not Part D requirements. Although incorporation of these provisions is required by law, failure to achieve final USEPA approval by July 1, 1979 does not trigger the economic growth limitations associated with Part D.

Part C—Prevention of Significant Deterioration

Regulation APC–19 of the Indiana submittal contains a plan for the prevention of significant deterioration of air quality. Section 110(a)(2)(D) and Part C of the Clean Air Act establish limitations on the deterioration of air quality in those parts of the Nation where the air quality is better than required to attain the National Ambient Air Quality Standards. The amount of deterioration permitted is quantified by a table of air quality increments which appear in section 163 of the Act. In effect, increments represent the amount of pollution that can be tole ated by an area without significantly deteriorating the clean air status of the area.

A principal means of protecting the increments is the review and regulation of new growth. USEPA is presently operating a federal permit system designed to protect the increments and will continue to do so until the State adopts an equivalent program. Regulations under which the Agency is operating are found at 40 CFR 52.21 as published June 1, 1978 (43 FR 26388). Regulations specifying requirements for an approvable State plan are found at 40 CFR 51.24 as published June 19, 1978 (43 FR 23680).

These regulations were judicially challenged in the U.S. Court of Appeals for the District of Columbia Circuit. On June 18, 1979, the court issued a preliminary opinion on the regulations in *Alabama Power Company* v. *Costle*, No. 78-1006. The court held invalid certain key provisions of the regulations. On September 5, 1979, USEPA proposed in the **Federal Register** (44 FR 51924;) various amendments to the PSD regulations. Some of these proposed amendments would replace the provisions rejected by the court; others would add entirely new provisions to supplement the replacement provisions. In December 1979 the court issued a final opinion. In it the court generally reaffirmed its earlier holdings. Subsequently, the USEPA stayed its PSD regulations as to certain sources and modifications (see 45 FR 7800, February 5, 1980).

Obviously, the court's opinion and any regulations promulgated as a result of it may affect various aspects of the Indiana plan for preventing significant deterioration. Nonetheless, USEPA believes that it is appropriate to proceed with its review of the plan based upon its existing regulations as stayed rather than awaiting the final promulgation of amended regulations. When the amended regulations are finally promulgated, the USEPA will advise Indiana of any changes required in its plan.

USEPA has reviewed the portions of Regulation APC–19 containing the Indiana prevention of significant deterioration plan and the applicable definitions in Regulation APC–1 and has determined that the Indiana plan for the prevention of significant deterioration satisfies the requirement of 40 CFR

51.24 with the exception of the permit by default provision cited in the discussion of Regulation APC–19. Therefore, USEPA is proposing to approve the Indiana PSD plan upon receipt of evidence that the permit by default provision has been deleted from Regulation APC–19 as it applies to sources covered under the PSD program.

Section 121—Consultation

Section 121 of the Act requires that the State provide a "satisfactory progress" for consulting with local governments and Federal land managers to meet certain requirements in the development of the SIP. A satisfactory progress of consultation must be included for transportation controls, air quality maintenance, preconstruction review of direct sources of air pollution, nonattainment requirements, prevention of significant deterioration, and certain compliance orders. This process must be ongoing and in accordance with regulations promulgated by USEPA at 44 FR 35176.

The proposed Indiana SIP contains a copy of a local agency agreement which provides for a process of consultation. USEPA proposes to approve this process of consultation upon the condition that Indiana forwards to USEPA copies of the executed agreements and that the agreements meet the requirements of CFR 51.246 (44 FR 35181) which states that the SIP "shall provide for an opportunity for Federal, State and local involvement in such consultation process no later than December 18, 1979."

Section 110(a)(2)(K)—Permit Fees

This section requires the owner or operator of each major stationary source to pay the permitting authority, as a condition of any permit required by the Clean Air Act, a fee to cover the reasonable costs of processing an application for permit and of implementing and enforcing the terms and conditions of the permit. Revised Indiana Regulation APC–19, section 14, details a comprehensive permitting fee system. USEPA proposes to approve this system as meeting the requirements of Section 110(a)(2)(K).

Section 126—Interstate Pollution

Section 126(a)(1) of the Act requires that the SIP provide for written notice to nearby states of any proposed major stationary source which may significantly contribute to levels of air pollution in excess of the National Ambient Air Quality Standards in that state. The Indiana SIP does not disclose procedures for the required written notice to other nearby states. During the thirty day comment period Indiana must submit a schedule to develop these procedures and to submit them to USEPA in a legally enforceable form, or USEPA will disapprove this portion of the SIP.

Section 126(a)(2) requires the State to identify existing major sources which may significantly contribute to levels of air pollution in neighboring states. On November 28, 1977 the Director of the Air Pollution Control Division of the Indiana State Board of Health sent letters with this information to each bordering state. USEPA proposes to approve this action as satisfying the requirement of Section 126(a)(2).

Section 127—Public Notification

Section 127 of the Act requires the SIP to contain measures for effective notification of the public on a regular basis of instances or areas in which any national primary ambient air quality standard is exceeded, to advise the public of hazards associated with such pollution and to enhance public awareness of measures which can be taken to prevent such standards from being exceeded.

The Indiana Air Pollution Control Board has incorporated in its local agency agreements the requirement that the agency "keep the public informed as to progress and status of local efforts to abate pollution through news releases, public appearances, talks and related activities." In addition, the Agency is to make all emission data and air quality data available to the public upon request.

Indiana Regulation APC–12 contains the criteria for the determining of air pollution episode levels and the procedure for reducing the episode level. Although the Technical Secretary has authority to declare an air pollution alert or

warning and the Governor has the authority to declare an air pollution emergency, the Indiana SIP does not contain a procedure for notifying the public.

USEPA proposes to approve APC–12 and the procedure for enhancing the public awareness in the Agency agreements if Indiana submits, within the comment period, a procedure for notifying the public of air pollution alerts, warnings, and emergencies.

Section 128—State Boards

Section 128 of the Act requires that any boards which approve permits or enforcement orders under the Act contain a majority of members who represent the public interest and do not derive any significant portion of their income from persons subject to permits or enforcement orders under the Act and that members of any such board adequately disclose any potential conflicts of interest. The Governor of Indiana submitted a questionnaire to the members of the Air Pollution Control Board to determine which members could be certified as representing the public interest and as not deriving a significant portion of their income from persons subject to permits or orders. The Governor and the Mayors who appoint local agency board members have committed themselves to having all prospective board members complete the questionnaire and to make appointments so that the boards will continue to represent the public interest as required by section 128 of the Act.

USEPA has not received the completed questionnaires from all present board members. USEPA proposes to approve this procedure as satisfying section 128 of the Act but requests that all disclosures of the present board members be submitted within the announced comment period.

Section 110(a)(2)(F)(ii) and (iii)—Continuous Emission Monitoring

The Indiana submittal contains a revision to existing regulation APC 8 which provides requirements for the continuous monitoring and recording of emissions for fossil fuel-fired steam generators, nitric acid plants, sulfuric acid

plants, and petroleum refinery catalyst regenerators of specified sizes. This revision corrects the three deficiencies cited by USEPA in its June 22, 1978 rulemaking (43 FR 26722) partially disapproving existing Regulation APC 8 and promulgating substitute regulations (40 CFR 52.796). Consequently, USEPA proposes to approve the revision to existing Regulation APC 8 as satisfying the statutory directive of sections 110(a)(2)(F) (ii) and (iii) and the regulatory requirements of 40 CFR 51.19(e) and to revoke the federally promulgated substitute regulations.

There are, however, two typographical errors which are confusing and must be corrected. Section 2.1 of the revision to Regulation APC 8 specifies that a continuous monitoring system for the measurement of sulfur dioxide must meet the performance specifications of *paragraph 3.1.1* of this regulation. The proper citation is *paragraph 3.1.3.* Another error is contained in section 2.1.3 of the proposed revision. This section specifies the conditions under which continuous monitors for the measurement of nitrogen oxides are required and provides an exemption under specified conditions. A phrase was omitted from the exemption provision specifying that the conditions can be satisfied during source compliance tests as required by the State. These two typographical errors must be corrected before USEPA final rulemaking in this revision to Regulation APC 8.

Interested persons are invited to comment on the revised Indiana SIP and on USEPA's proposed actions. Comments should be submitted to the address listed in the front of this Notice. Public comments received within thirty days of publication will be considered in USEPA's final rulemaking on the SIP. All comments received will be available for inspection at Region V Office Air Programs Branch, 230 South Dearborn Street, Chicago, Illinois 60604.

Under Executive Order 12044 (43 FR 12661), USEPA is required to judge whether a regulation is "significant" and, therefore, subject to certain procedural requirements of the Order or whether it may follow other specialized developmental procedures, USEPA labels proposed regulations, "special-

ized." I have reviewed this proposed regulation pursuant to the guidance in USEPA's response to Executive Order 12044, "Improving Environmental Regulations," signed March 12, 1979 by the Administrator and I have determined that it is a specialized regulation not subject to the procedural requirements of Executive Order 12044.

This Notice of Proposed Rulemaking is issued under the authority of Section 110 of the Clean Air Act, as amended.

Dated: October 25, 1979.

Regional Administrator.

(FR Doc. 80-9497 Filed 3-26-80; 8:45 am)

BILLING CODE 6560-01-M

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46 Fed. Reg. 21,790-91 (1981)

40 CFR Part 65

[ORC-5-FRL 1804-4]

State and Federal Administrative Orders Permitting a Delay in Compliance With State Implementation Plan Requirements; Proposed Disapproval of Administration Order Issued by Indiana Air Pollution Control Board to Bethlehem Steel Corp.

AGENCY: Environmental Protection Agency.
ACTION: Proposed Disapproval.

SUMMARY: By letter of December 26, 1978, the Indiana Air Pollution Control Board submitted for EPA review and approval a Delayed Compliance Order (DCO or the Order) which it had issued to Bethlehem Steel Corporation, Burns Harbor, Indiana (Bethlehem) on November 15, 1978, under Section 113(d)(1) of the Clean Air Act. EPA issued its final disapproval of the DCO on September 17, 1979. Bethlehem filed Petition for Review with the United States Court of Appeals for the Seventh Circuit, and on December 22, 1980 the Court issued its opinion remanding the matter to EPA for further proceedings in accordance with its opinion. *Bethlehem Steel Corporation* v. *U.S. EPA*, No. 79-2382 (7th Cir., December 22, 1979). Pursuant to the Court's remand we have considered the Order.

EPA proposes to disapprove the Order because the Order does not require compliance with the federally approved State Implementation Plan (SIP) for Indiana. The Order requires the Company to bring air emissions from its coke oven batteries into compliance by July 1, 1979, with Regulations APC–3 and APC–5 of the Indiana Air Pollution Control Board (Indiana APC–3 and Indiana APC–5). However, Indiana Rule APC–3 was not approved by EPA as part of the Indiana SIP in the form in which the Indiana Order requires Bethlehem to comply.

Because the Order has been issued to a major source and purports to permit a delay in compliance with provisions of the SIP, it must be approved by EPA before it can become effective as a Delayed Compliance Order under the Clean Air Act (the Act). A source in compliance with an approved order may not be sued under the federal enforcement or citizen suit provisions of the Act for violations of the SIP regulations covered by the Order. The purpose of this notice is to invite public comment on EPA's proposed disapproval of the Order as a Delayed Compliance Order.

DATE: Written Comments must be received on or before May 14, 1981.

ADDRESSES: Comments should be submitted to Docket 5A-81-1 Air Programs Branch, Region V, 230 South Dearborn Street, Chicago, Illinois 60604 and to Susan Weinstein Schaffer, Assistant Regional Counsel, EPA, Region V, 230 South Dearborn Street, Chicago, Illinois 60604. The State Order, supporting material, and public comments received in response to this notice may be inspected and copied (for appropriate charges) at this address during normal business hours.

FOR FURTHER INFORMATION CONTACT: Susan Weinstein Schaffer, Assistant Regional Counsel, U.S. Environmental Protection Agency, 230 South Dearborn Street, Chicago, Illinois 60604, Telephone (312) 886-6670.

SUPPLEMENTARY INFORMATION: Because the Order under consideration has been issued to a major source of particulate and visible emissions and purports to permit a

delay in compliance with the applicable regulation, EPA must approve it before it may become effective as a Delayed Compliance Order under Section 113(d) of the Act, EPA may approve the Order only if it satisfies the requirements of Section 113(d)(1).

Bethlehem Steel Corporation operates a steel production facility at Burns Harbor, Indiana. The Order under consideration deals with control of emissions from two coke batteries at the facility. The facility is subject to Indiana SIP Rule APC–3 as approved by EPA on October 28, 1975, 40 FR 50032, and SIP Rule APC–5, as approved on May 31, 1972. 37 FR 10863. Indiana APC–3, as promulgated by Indiana on October 7, 1974, sets the standards for visible emissions, but is less stringent than the federally approved SIP APC–3. The Order does not require compliance with the applicable Indiana SIP. The Order, at Order paragraph 1, requires compliance with "* * * Indiana-Air Pollution Control Board Regulations APC–3 and APC–5 no later than July 1, 1979." The Indiana Air Pollution Control Board has clarified by letter its intent that the version of APC–3 which it promulgated on October 7, 1974, apply to Bethlehem. That version of APC–3 contains a 15-minute exemption, allowing uncontrolled emissions for 15 minutes in each 24 hour period. That 15 minute exemption was disapproved when Indiana submitted the revised APC–3 (40 FR 50032, October 28, 1975) and therefore is not part of the federally approved Indiana State Implementation Plan. (EPA has consistently taken the view that the 15 minute exemption is not part of the approved SIP, as is shown by orders collected in docket for this action. A recent federal district court decision confirms that the applicable SIP regulation does not include the 15 minute exemption. *Public Service Company of Indiana, Inc.* v. *U.S. EPA*, No. I.P. 80-332-C (S.D. Ind. January 12, 1982).) Therefore, EPA cannot approve this Order. It fails to require compliance with the applicable Indiana Implementation Plan as required by Section 113(d)(1)(D) of the Act.

Disapproval of the Order on the ground stated should not be interpreted as expressing any view on any other aspect of the Order, such as the waiver by Indiana of certain

enforcement tools in the event of violations of the order or of SIP requirements due to events beyond Bethlehem's control.

If EPA disapproves the Order, compliance with it would not preclude federal enforcement action under Section 113 of the Act against the source for violations of the regulation covered by the Order during the period the Order is in effect. Enforcement against the source under the citizen suit provisions of the Act (section 304) would similarly not be precluded.

Section 113(d)(2) requires that where the Administrator objects to the issuance of the state order, "he shall simultaneously proceed to issue an enforcement order in accordance with subsection (a) or an order under this subsection." The issuance of a federal delayed compliance order would be inappropriate since it is manifest that Bethlehem Steel could not come into compliance by the ultimate compliance date of July 1, 1979, which has passed. Similarly, the issuance of an order under Section 113(a) of the Act requiring compliance would also be futile under the circumstances. Were it to call for less than immediate compliance it would modify the SIP in contravention of section 110(i). Section 110(i) prohibits modification of a SIP (including modification of the date of compliance) except in accordance with certain specific subsections of the Act, which do not include subsection 113(a). Bethlehem itself concedes that it is not capable of immediate compliance. Were EPA to issue a Section 113(a) order, EPA would immediately be confronted with the need to institute a proceeding under Section 113(b). This has already been accomplished by the filing of a civil action against Bethlehem in the Northern District of Indiana. *United States* v. *Bethlehem Steel Corporation*, Civil No. H78-491 (N.D. Ind.), filed on December 21, 1978.

Pursuant to the provision of 5 U.S.C. 605(b) I hereby certify that this proposed rule will not if promulgated, have a significant economic impact on a substantial number of small entities. The reason for this finding is that the subject of this action only affects one entity. In addition, this action involves

an "order," rather than a rule and therefore is not subject to the requirements of the Regulatory Flexibility Act in any event.

Pursuant to the provisions of Executive Order 12291, 45 FR 13193 (Feb. 19, 1981), I have determined that this action is not a proposed "rule", as defined by Executive Order 12291, becuase it is not of general applicability nor does it have future effects. Furthermore, even if it were a rule it is not a "major rule", defined as Executive Order 12291, because it is not likely to result in: (1) an annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

All interested persons are invited to submit written comments on the proposed disapproval of the Order. Written comment received by the date specified above will be considered in determining whether EPA will disapprove the Order. After the public comment period, the Administrator of EPA will publish in the **Federal Register** the Agency's final action on the Order.

Dated: February 25, 1981.

(42 U.S.C. 7413, 7601)

Valdas V. Admakus,

Acting Regional Administrator, Region V.

[FR Doc. 81-11276 Filed 4-13-81; 8:45 am]
BILLING CODE 6560-38-M

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47 Fed. Reg. 9019-25 (1982)

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 81

[A-5-FRL-1936-6]

Approval and Promulgation of Implementation Plans; Indiana

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rulemaking.

SUMMARY: This notice proposes rulemaking on a revision to the Indiana State Implementation Plan (SIP) for total suspended particulates (TSP) pursuant to Part D of the Clean Air Act (Act) as amended in 1977 and other general provisions. The purpose of this notice is to discuss EPA's evaluation of the revision and to solicit public comments on the revision and on EPA's proposed action.

DATE: Comments on this revision and on the proposed EPA action must be received by April 2, 1982.

ADDRESSES: Copies of the SIP revision are available at the following addresses for review:

Indiana Air Pollution Control Division, Indiana State Board of Health, 1330 West Michigan Street, Indianapolis, Indiana 46206

Public Information Reference Unit, Environmental Protection Agency, 401 M. Street, SW., Washington, D.C. 20460

and by appointment at:

File Number: B180, Air Programs Branch, Docket Room, 11th Floor, Environmental Protection Agency, Region V, 230 South Dearborn Street, Chicago, Illinois 60604, 312-353-2211

Comments on this proposed rule should be addressed to: (Please submit an original and five copies is possible) Gary Gulezian, Chief, Regulatory Analysis Section, Air Programs Branch, EPA, Region V, 230 South Dearborn, Chicago, Illinois 60604.

FOR FURTHER INFORMATION CONTACT: Susanne S. Karacki at 312-353-2211 or at the above EPA, Region V address.

SUPPLEMENTARY INFORMATION:

I. Introduction

On March 3, 1978 (43 FR 8962) and on October 5, 1978 (43 FR 45993), pursuant to the requirements of section 107 of the Act, EPA designated parts of eleven counties in Indiana as nonattainment of the National Ambient Air Quality Standards (NAAQS) for TSP. These designated nonattainment

areas were in Clark, Dearborn, Dubois, Howard, Lake, LaPorte, Marion, St. Joseph, Vanderburgh, Vigo, and Wayne Counties. On May 21, 1980, the State of Indiana requested that LaPorte County be redesignated from primary nonattainment to attainment. EPA approved this request on September 25, 1981 (46 FR 47220).

Part D of the Act requires each state to revise its SIP to meet specific requirements for the areas designated at nonattainment. These SIP revisions must demonstrate attainment of the primary TSP NAAQS as expeditiously as practicable, but no later than December 31, 1982. If attainment of the NAAQS by December 31, 1982 cannot be demonstrated for an area designated as nonattainment for TSP, an acceptable alternative SIP for that area must include provisions for applying reasonably available control technology (RACT) to stationary sources of particulate emissions and studying the nature and extent of the nontraditional particulate sources in the area. The study would then be used in designing a control strategy for such sources. The requirements for an approvable SIP are further described in a Federal Register notice published April 4, 1979 (44 FR 20372). Supplements to the April 4, 1979 notice were published on July 2, 1979 (44 FR 38583), August 28, 1979 (44 FR 50371), September 17, 1979 (44 FR 53761), and November 23, 1979 (44 FR 67182).

On June 26, 1979, pursuant to Part D of the Act, the State of Indiana submitted to EPA a proposed control strategy and regulations for TSP. EPA reviewed Indiana's submittal and proposed rulemaking on March 27, 1980 (45 FR 20432). Since March 27, 1980 Indiana has submitted new control strategies and regulations for TSP that have substantially modified many of those acted upon at that time. Based on these new submittals, EPA is reproposing rulemaking action on the Indiana Part D TSP SIP. Accordingly, today's proposal supersedes all actions proposed in the March 27, 1980 notice for TSP except for Knauf Fiberglass. On July 3, 1980 (45 FR 45314) EPA proposed rulemaking for that portion of the Indiana Part D SIP pertaining to particulate emissions from

iron and steel process sources. The action proposed by EPA on July 3, 1980 is still relevant and, accordingly, the adequacy of the Indiana Part D SIP as it applies to the iron and steel industry (coke batteries and processes at integrated iron and steel mills) will not be addressed in this notice except to the extent that disapproval of 325 IAC 5-1 affects these sources.

The table below summarizes the regulations considered in today's proposed rulemaking on the Indiana Part D TSP SIP[1]) and other general provisions:

Regulation	Date of submittal	Proposed action
Codification of Air Pollution Control Board Regulations	Oct. 6, 1980	Approval.
325 IAC 5-1 Opacity Limitations	Oct. 6, 1980	Disapproval.
325 IAC 6-1 Particulate Emission Limitations for Non-attainment Areas	June 26, 1979	Approval.
Section 4 Compliance Time Schedules	Oct. 6, 1980	
Section 2(e) Foundry Melt process	Oct. 6, 1980	
325 IAC 6-1-17 Clark County	July 8, 1981	Approval.
325 IAC 6-1-8 Dearborn County	Oct. 6, 1980	Approval.
Amendments	Aug. 10, 1981	
325 IAC 6-1-9 Dubois County	Oct. 6, 1980	Approval.
325 IAC 6-1-15 Howard County	Jan. 29, 1981	Approval.
325 IAC 6-1-12 Marion County	Feb. 11, 1980	Approval.
Amendments	Oct. 28, 1981	
325 IAC 6-1-18 St. Joseph County	July 8, 1981	Approval.
325 IAC 6-1-16 Vanderburgh County	Jan. 29, 1981	Approval.
Amendments	Oct. 28, 1981	
325 IAC 6-1-13 Vigo County	Jan. 29, 1981	Approval.
Amendments	Oct. 28, 1981	
325 IAC 6-1-14 Wayne County	Oct. 6, 1980	Approval.
Amendments	Jan. 29, 1981	
325 IAC 1.1-3 Vigo County	May 26, 1981	Approval.
Redesignation:		
Schedule for development of Industrial Fugitive Dust Regulations (325 IAC 6-5).	Nov. 25, 1981	Conditional Approval. (Regulation is necessary for approvable Part D TSP SIP in Clark, Dearborn, Dubois, Howard, Marion, St. Joseph, Vanderburgh and Vigo Counties.)
Schedule for Nontraditional Dust Studies.	Jan. 29, 1981	Approval.
325 IAC 6-3 Particulate Emission Limitations for Process Operations.	Oct. 6, 1980	Approval.

In this Notice EPA is specifying those portions of the proposed revisions to the Indiana SIP which it considers approvable, conditionally approvable, or disapprovable. For minor deficiencies, EPA proposes to approve the SIP on the

[1] The Part D SIP Strategy for Lake County will be addressed in a subsequent notice.

condition that the State provides strong assurances that the deficiencies will be corrected by specified dates. The July 2, 1979 (44 FR 38583) and November 23, 1979 (44 FR 38583) *Federal Register* Notices discuss conditional approvals in more detail.

It should be noted that the measures proposed for promulgation today will be in addition to, and not in lieu of, existing SIP regulations. The present emission control regulations for any source will remain applicable and enforceable to prevent a source from operating without controls, or under less stringent controls, while it is moving toward compliance with the new regulations; or if it chooses, challenging the new regulations. In some instances, the present emission control regulations contained in the federally approved SIP are different from the regulations currently being enforced by the State. In these situations, the present federally approved SIP will remain applicable and enforceable until there is compliance with the newly promulgated and federally approved regulations. Failure of a source to meet applicable pre-existing regulations will result in appropriate enforcement action, including assessment of noncompliance penalties. Furthermore, if there is an instance of delay or lapse of the new regulations, because of a court order or for any other reason, the pre-existing regulations will be applicable and enforceable.

The only exception to this rule is in cases where there is a conflict between the requirements of the new regulations and the requirements of the existing regulation such that it would be impossible for a source to comply with the pre-existing SIP while moving toward compliance with the new regulation. In this situation, the State may exempt a source from compliance with pre-existing regulation. Any exemptions granted will be reviewed and acted on by EPA either as a part of these promulgated regulations or as a future SIP revision.

The following sections of the notice discuss EPA's evaluation of the Indiana Part D TSP SIP and other general provisions. EPA solicits comments on both the proposed SIP revision and the proposed EPA action on these revisions from

all interested parties. EPA also encourages residents and industries in adjoining State to comment on any interstate air quality impacts of the proposed revision.

II. Control Strategy Evaluation of the Indiana Part D SIP for TSP

The Indiana Part D SIP for TSP contains monitored air quality data trend analyses, point and area source emission inventories, meteorological data summaries, summaries of annual and short-term dispersion modeling studies, air pollution control regulations, economic and energy impact analyses, and reasonable further progress schedules. Indiana used dispersion modeling to develop a TSP control strategy to attempt to demonstrate attainment in all nonattainment counties. On January 29, 1981 the State submitted an "Indiana State Implementation Plan TSP Control Strategy Summary" which identified the State rule promulgation date, technical support document title and date, date of formal submittal to EPA, future amendments, and the basis of the Part D TSP SIP strategy for each nonattainment county. The January 29, 1981 strategy summary stated that the strategies for Lake,[2] Marion, and Vigo Counties demonstrated primary attainment and that the strategies for Clark, Dearborn, Dubois, Howard, St. Joseph, Vanderburgh, and Wayne Counties applied RACT but do not show attainment.

Section 172(b)(2) of the Act requires the implementation of reasonably available control measures as expeditiously as practicable. EPA has defined RACT as the lowest emission limit that is reasonably available considering technical and economic feasibility. It may require technology that has been applied to similar, but not necessarily identical source categories. In the nonattainment area control strategies RACT may mean more restrictive limitations than that required by the existing SIP regulations (i.e. existing SIP is

[2] As stated previously, the Lake County TSP strategy will not be addressed in this notice.

not stringent enough to attain the standards) and generally no less restrictive than status quo (no removal of existing particulate control equipment.) It is not intended that extensive research and development be conducted before a given control technology can be applied to a source, but it does mean that in the case where an emission limitation for a source is less stringent than a State-set generic RACT level, it should be documented on a case-by-case basis.

Indiana has defined generic RACT standards for power plants and industrial boilers, foundries, grain elevators and terminals, asphalt plants, incinerators and painting operations. These generic RACT levels, along with other information such as the existing degree of control were used to set source specific limitations for the sources in the Indiana nonattainment counties. In addition, the Indiana RACT strategy included visible emission regulations and a commitment by the State to develop industrial fugitive dust regulations.

A number of sources in the Indiana Part D SIP in counties where the strategy is based on RACT plus nontraditional particulate matter studies have emission limitations that are less stringent than RACT as defined by Indiana for that type of source. Given that these sources have annual emissions of less than 100 tons per year and/or are located in secondary nonattainment areas, EPA proposes to approve their emission limitations as RACT.

As a final part of the TSP strategy the State has submitted a schedule to complete and implement nontraditional particulate matter studies.

EPA has reviewed the TSP control strategies and regulations submitted by Indiana. A summary of EPA's findings is set forth below. A detailed discussion of EPA's evaluation can be found in the Indiana TSP SIP Rationale which is on file at the addresses above.

Nontraditional Particulate Matter Studies

Part D SIP control strategies that do not demonstrate attainment despite the application of RACT for the emission

sources must also contain a commitment to study the nature and extent of nontraditional particulate sources. On January 29, 1981 the State formally committed to perform a nontraditional particulate matter study and to develop a control strategy and regulations to control nontraditional sources for Marion, Dubois, Clark, Wayne, Dearborn, St. Joseph, Howard, and Vanderburgh Counties. The study will include the analysis of hi-vol filters, the identification of the sources which have contributed to the filter loading, a review of fugitive dust control demonstration projects, and the development of control strategies. EPA has reviewed the schedule of activities submitted by the State and found it to be approvable. However, the Indiana Part D TSP SIP remains deficient in this area because there is no commitment from the State to conduct nontraditional particulate matter studies in Vigo County. Accordingly, EPA proposes to approve the nontraditional fugitive dust studies portion of the Indiana Part D TSP SIP with the understanding that during the public comment period the State will commit to conduct nontraditional particulate matter studies in Vigo County and submit a schedule to do so.

325 IAC 5-1 Visible Emission Limitation

Visible emission regulations are an integral portion of RACT for TSP sources and are a required component of a SIP for TSP pursuant to 40 CFR 51.19(c). The visible emission limitations submitted by the State on October 6, 1980 apply to all particulate sources in both attainment and nonattainment areas.

EPA has reviewed 325 IAC 5-1 and found it to be unapprovable for the following reasons.

1. The regulation allows greater than 60 percent opacity for a cumulative total of 15 minutes (60 readings) in a six-hour period. This limitation is a relaxation from the existing Indiana SIP opacity limitation which does not allow the exceedance of 40 percent opacity and would result in little, if any, control requirements for most sources.

2. It is unclear as to which provisions apply to stack sources and which provisions apply to non-stack sources.

3. It is internally inconsistent in that it refers to sections that do not exist.

4. The lack of a definition for "intermittent sources" make it impossible to determine which sources are subject to which provisions.

5. The lack of a definition or computation method for "continuous minutes" appears to allow almost unlimited temporary exemptions from the regulation.

6. It allows continuous emission monitoring to take precedence over opacity observations for determining compliance which precludes enforcement of opacity violations due to condensibles formed beyond the in-stack monitor and precludes an independent verification of compliance with the visible emission limitations by regulatory agencies.

Although not an approvability issue, the regulation does not contain specific procedures for correlating alternate opacity limits with stack test results. Failure to develop such a procedure will make it difficult to formulate valid alternate opacity limits for sources in compliance with mass limitations.

A detailed discussion of these deficiencies is set forth in the Rationale which is available at the addresses above.

In light of these deficiencies, EPA proposes to disapprove 325 IAC 5-1, Visible Emission Limitations for all sources in the State of Indiana. Indiana's regulation APC 3, as federally approved on October 28, 1975, will remain effective and enforceable statewide in attainment, nonattainment, and unclassified areas. EPA believes that the federally approved regulation APC 3 represents RACT for all sources including iron and steel sources and satisfies the requirement of the Act for an approvable Part D SIP for opacity.

Schedule for Development of Rule 325 IAC 6-5 Industrial Fugitive Dust Rule

An integral portion of RACT for TSP sources in nonattainment areas is industrial fugitive dust regulations. These regulations are necessary in all nonattainment areas where the Part D TSP control strategy is based on RACT and further studies of nontraditional sources and, in fact, are generally necessary in Indiana to demonstrate attainment in those nonattainment areas where the Part D TSP strategy is based on a modeled attainment demonstration.

On January 29, 1981 the State formally submitted a schedule for the development, adoption, promulgation, and submittal of its regulation to implement RACT on industrial fugitive emission sources (codified at 325 IAC 6-5) by November 15, 1981. On November 25, 1981 the State revised its projected submittal date to April 1982. EPA has reviewed this schedule and finds it approvable. However, the Indiana TSP SIP remains deficient in this area in that there are presently no approvable industrial fugitive dust RACT regulations in any of the nonattainment TSP counties covered by this notice. The proposed approval of the Indiana Part D SIP for TSP in Clark, Dearborn, Dubois, Howard, Marion, St. Joseph, Vanderburgh, and Vigo Counties is conditioned with the submittal of approvable industrial fugitive dust regulations by April 1982.

It should be noted that the present Indiana Part D SIP does not contain any short-term emission limits for some mineral aggregate operations and grain terminal operations that are specifically listed in 325 IAC 6-1-8 Dearborn County, 325 IAC 6-1-9 Dubois County and 325 IAC 6-1-15 Howard County. EPA proposes to approve the Indiana TSP regulations for the counties where these sources are located with the understanding that the State will include regulations for the major sources without short term emission limits in its industrial fugitive dust regulations or that the State during the public comment period will submit or commit to a schedule to submit the missing short term emission limitations for the major sources in 325 IAC 6-1-8, 325 IAC 6-1-9, and 325 IAC 6-1-15.

325 IAC 6-1 Particulate Emissions for Nonattainment Areas

The TSP regulations in 325 IAC 6-1 submitted by the State on June 26, 1979, as amended on October 6, 1980, apply to particulate sources in nonattainment areas. The regulation contains general emission limitations (section 2), test methods (section 3), compliance timetables (section 4) and other general provisions (sections 5 and 6).

The general emission limitations in Section 2 are applicable to all sources with the potential to emit 100 tons or more of TSP per year or have actual emissions of 10 tons or more of TSP per year that are not specifically listed in the appendix to the rule. (The appendix to 325 IAC 6-1 (325 IAC 6-1-8 thru 325 IAC 6-1-18) contains source specific regulations for most sources in each nonattainment county. These regulations are discussed later in this notice.) Specific RACT based emission limitations are given for fuel combustion steam generators, asphalt concrete plants, grain elevators, foundries, glass container manufacturing, mineral aggregate operations and general sources.

EPA has evaluated the provisions of 325 IAC 6-1, Sections 1 through 6, and found them to be approvable. Accordingly, EPA proposes to approve 325 IAC 6-1, Sections 1 through 6, except as set forth below:

1. Section 2(d)(1)(A) which regulates grain elevators is expressed in terms of "0.03 grams per dry standard cubic foot." "0.03 grams" should be expressed in terms of "0.03 grains." This typographical error needs to be corrected. EPA proposes to approve section 2(d)(1)(A) with the understanding that the State will correct the typographical error.

2. Section 2(d)(2)(C) regulates the percent opacity from affected grain elevators as determined pursuant to 325 IAC 5-1. Since EPA is proposing to disapprove 325 IAC 5-1, EPA proposes to approve section 2(d)(2)(C) with the understanding that EPA will rely on the federally approved regulation APC 3 to determine percent opacity from affected grain elevators.

3. Section 3 specifies that the test methods to determine compliance with the regulation shall be conducted in accordance with the procedures set forth in Methods 1-5, Appendix A of 40 CFR Part 60 or other procedures approved by the Indiana Air Pollution Control Board (IAPCB). This section does not contain provisions to determine compliance with short term emission limits for process fugitive sources that do not vent through a stack such as grain elevators and mineral aggregate operations. The regulation also does not require other test procedures approved by the IAPCB to be submitted to EPA as a SIP revision. EPA proposes to approve section 3 with the understanding that alternative test methods approved by the IAPCB will be submitted to EPA as SIP revisions and during the public comment period the State will clarify the intent of this section for non-stack sources and submit the method that will be used to determine compliance for non-stack sources.

325 IAC 6-1-17 Clark County (Primary nonattainment), 325 IAC 6-1-18 St. Joseph County (Secondary nonattainment), 325 IAC 6-1-16 Vanderburgh County (Secondary nonattainment)

On the dates referenced in the summary table at the beginning of this notice the State submitted the control strategies and regulations for the nonattainment portions of Clark, St. Joseph, and Vanderburgh Counties. In the January 29, 1981 strategy summary Indiana stated that its Part D TSP SIP strategies for these counties do not show attainment, but do apply RACT and the commitment to perform the necessary nontraditional particulate matter studies. EPA has reviewed the technical support and regulations and agrees that the emission limitations for the Clark, St. Joseph, and Vanderburgh County sources represent RACT. Accordingly, EPA proposes to approve 325 IAC 6-1-17, 325 IAC 6-1-18, and 325 IAC 6-1-16 for Clark, St. Joseph, and Vanderburgh Counties. However, as discussed previously, approval of the Part D TSP SIP strategy for these three counties is conditioned on the submittal of approvable industrial fugitive dust regulations by April 1982.

325 IAC 6-1-8 Dearborn County (Primary nonattainment), 325 IAC 6-1-9 Dubois County (Primary nonattainment), 325 IAC 6-1-15 Howard County (Secondary nonattainment)

On the dates referenced in the table at the beginning of this notice the State submitted the control strategies and regulations for the nonattainment portions of Dearborn, Dubois, and Howard Counties. In the January 29, 1981 strategy summary Indiana stated that its Part D SIP strategies for these Counties do not show attainment, but do apply RACT and the commitment to perform the necessary nontraditional particulate matter studies.

EPA has reviewed the technical support and regulations and agrees that the emission limitations for the Dearborn, Dubois, and Howard County sources represent RACT with the exception of those sources with no short term emission limitations. EPA's proposed rulemaking action for these sources is discussed under industrial fugitive dust regulations. EPA proposes to approve the remainder of 325 IAC 6-1-8, 325 IAC 6-1-9, and 325 IAC 6-1-15 for Dearborn, Dubois, and Howard Counties. However, as discussed previously, approval of the Part D SIP strategy for these three counties is conditioned on the submittal of approvable industrial fugitive dust regulations by April 1982.

325 IAC 6-1-12 Marion County (Primary nonattainment)

On February 11, 1980 and October 28, 1981 the State submitted the control strategy and regulations for the nonattainment portions of Marion County. In the January 29, 1981 strategy summary Indiana stated that its Part D SIP strategy for Marion County demonstrated attainment of the primary TSP standards.

Indiana performed a dispersion modeling analysis which projects that a significant reduction in ambient TSP concentrations will occur by the application of at least RACT to major point sources. The remaining TSP reductions are projected to come from the control of area source emissions through a proposed residential open burning ban. The State

utilized a modified version of the Climatological Dispersion Model (MCDM), the reference, multi-source long-term Gaussian dispersion model with five years (1960-64) of representative Indianapolis, Indiana meteorological data to predict the annual TSP air quality impacts. Larsen's transformation techniques were used to partially determine the 24-hour TSP impacts. EPA has reviewed the Marion County TSP analysis and found a number of technical deficiencies within the modeling methodology. They are as follows:

1. Inadequate receptor resolution. The State placed receptors 1.25 km apart where present guidance says that receptors should be placed 1.0 km, apart with additional receptors placed approximately 0.5 km apart in maximum impact areas.

2. Although Indiana stated that five years of meteorological data were used results from only one critical year were submitted. The modeling results for the other four years should be submitted.

3. The State used Larsen's transformation model to predict the *maximum* 24-hour concentration at monitor sites based on the MCDM predictions. The State did not predict the *high, second high* 24-hour concentration and thus did not specifically address the primary and secondary 24-hour TSP NAAQS. There are two primary TSP NAAQS, an annual geometric mean concentration of 75 $\mu g/m^3$ and a 24-hour average concentration of 260 $\mu g/m^3$ not to be exceeded more than once annually. The secondary NAAQS for TSP include an annual geometric mean concentration of 60 $\mu g/m^3$ (guideline only, not a standard) and a short term 24-hour average concentration of 150 $\mu g/m^3$ not to be exceeded more than once annually. The MCDM results for Marion County predicted a maximum annual concentration of 74.5 $\mu g/m^3$, which is just under the annual primary standard, and a maximum (not high, second high) 24-hour concentration of 326 $\mu g/m^3$, which does not address the 24-hour primary or secondary standard.

Although the State did not submit any data which specifically demonstrates that either the annual or 24-hour

primary TSP NAAQS will be violated, additional receptors and the proper application of Larsen's transformation to estimate a high, second high are necessary before the primary or secondary standard attainment demonstration can be approved. It should be noted, however, that the predicted maximum 24-hour value far exceeds the 24-hour primary and secondary standards. In addition, since the Marion County residential open burning ban is an integral portion of the modeled control strategy, the ban must be adopted at the State level and submitted to EPA as part of the attainment demonstration.

However, since Indiana stated that the Marion County attainment strategy applied RACT on the point sources, since Indiana has commited to submit industrial fugitive dust regulations by April 1982, and since Indiana indicated on January 29, 1981 that Marion County was included in its nontraditional particulate matter studies the alternate Part D TSP strategy of RACT (on both point sources and industrial fugitive dust sources) plus nontraditional fugitive dust studies rather thar. a rigorous attainment demonstration would apply in Marion County.

EPA has reviewed the regulations and technical support for Marion County and agrees that the emission limitations for the Marion County sources represent RACT. Therefore, EPA proposes to approve 325 IAC 6-1-12, except for those portions of the regulations which apply to RACT for the iron and steel process sources. As discussed previously, approval of the Part D SIP strategy for Marion County is conditioned on the submittal of approvable industrial fugitive dust regulations by April 1982. The approvability of the complete control strategy including the iron and steel process sources for Marion County will be addressed in a subsequent notice. It should be noted that EPA's proposed approval of the Marion County regulations does not preclude the State from resubmitting the Marion County modeled attainment demonstration with the necessary corrections and corresponding regulations.

325 IAC 6-1-13 Vigo County (Primary nonattainment)

On January 29, 1981 and October 28, 1981 the State submitted the control strategy and regulations for the nonattainment portions of Vigo County. In its submission Indiana stated that its Part D SIP strategy for Vigo County demonstrated attainment of the primary particulate standard. On May 26, 1981, Indiana requested that portions of Vigo County be redesignated attainment for TSP. This redesignation request is addressed later in this notice.

Indiana submitted a dispersion modeling analysis for Vigo County which was prepared by the Wabash Valley Environmental Association (WVEA) in cooperation with the Indiana Air Pollution Control Division and the Vigo County Air Pollution Control Division. WVEA utilized CDMQC, a reference, multi-source Gaussian dispersion model with five years (1974-1978) of Star J meteorological data from Terre Haute to predict a maximum annual geometric mean of 67.4 μg/m3. Although the model had the capability of predicting the high, second high 24-hour impacts through Larsen's transformations, this was not done by WVEA.

EPA has reviewed the Vigo County TSP analysis and found a number of technical deficiencies within the modeling methodology. They are as follows:

1. Inadequate receptor resolution. Receptors were placed 1.0 km apart in areas of high industrial activity and high population density and 2.0 km apart in more remote areas. Present EPA guidance says that additional receptors should be placed approximately 0.5 km apart in areas of high modeled concentrations.

2. Lack of calibration analysis and inadequate support for background concentration. Because insufficient monitoring data were available for the base year, 1978, CDMQC was not calibrated. Nevertheless, WVEA still used the sparse 1978 monitoring data base to derive a background concentration.

To correct these deficiencies WVEA could use 1979 as the base year for calibrating the model. Sufficient 1979 data are available from 8 monitors in the county. The emission

inventory could be updated to 1979 and 1979 meteorological data could be obtained. The intercept of the calibration curve can then be used as the background concentration.

3. Unacceptable 24-hour attainment demonstration. No support has been provided to support the State's claim that annual concentrations less than 69.5 $\mu g/m^3$ will protect the 24-hour standards. Larsen's transformations must be applied to the modeled annual concentrations to derive 24-hour concentrations. The conversion factor should include the appropriate standard geometric deviations based on the 1979 monitoring data.

Accordingly, although the modeling does not predict any violations of the NAAQS for TSP, deficiencies exist in the modeling which must be corrected before the attainment demonstration can be approvable.

As an alternative, the State can base its Part D TSP SIP strategy for Vigo County on RACT plus nontraditional particulate matter studies rather than a rigorous attainment demonstration. In this case, however, the State must commit to apply the industrial fugitive dust regulations and the nontraditional fugitive dust studies in Vigo County.

EPA has received the technical support and regulations and agrees that the emission limitations for Vigo County represent RACT. Therefore, EPA proposes to approve 325 IAC 6-1-13, except for those portions of the regulations which apply to RACT for the iron and steel process sources. As discussed previously, approval of the Part D TSP SIP strategy for Vigo County is conditioned on the submittal of approval industrial fugitive dust regulations by April 1982. The approvability of the complete control strategy including iron and steel process sources for Vigo County will be addressed in a subsequent notice. It should be noted that EPA's proposed approval of the Vigo County regulations does not preclude the State from resubmitting the Vigo County modeled attainment demonstration with the necessary correction and corresponding regulations.

325 IAC 6-1-14 Wayne County

On October 6, 1980 the State submitted the control strategy and regulations for the nonattainment portions of Wayne County. Amendments to the regulations and technical support document were submitted on January 29, 1981. On January 29, 1981 Indiana stated that its Part D SIP strategy for Wayne County does not show attainment, but does apply RACT and the commitment to perform the necessary nontraditional particulate matter studies. On November 20, 1980 Indiana requested that Wayne County be redesignated attainment for TSP based on the rural fugitive dust policy. EPA redesignated the nonattainment portions of Wayne County from nonattainment to unclassified on November 2, 1981 (46 FR 54340) based on uncertainties in the monitored data.

EPA has reviewed the technical support and regulations and agrees that the emission limitations for the Wayne County sources represent RACT. Accordingly, EPA proposes to approve the control strategy and regulations for Wayne County. Since EPA has redesignated Wayne County from nonattainment to unclassified, the submittal of approval industrial fugitive dust regulations for Wayne County is not a condition of EPA's approval in this notice.

III. General Provisions

The State has submitted a number of other provisions to be included in the SIP that are not specifically required by Part D of the Act. These provisions are addressed below.

Codification of the Indiana Air Pollution Control Board Regulations

On October 6, 1980 the State submitted a codification of the IAPCB Rules and Regulations to replace Appendix 8.1 which sets forth the current IAPCB regulations. The codification places the regulations into an organized framework that is consistent with the Indiana Administrative Code. This action codifies the Air Pollution Control Regulations APC 1 through APC 23 into 325 IAC 1.1-12 as set forth below:

New codification	Name	Form No.
325 IAC 1.1-1	Definitions	APC 1.
325 IAC 1.1-2	Ambient Air Quality Standards	APC 14.
325 IAC 3.1-3	Nonattainment/Attainment/Unclassifiable Designations	APC 22.
325 IAC 1.1-4	Episode Levels and Actions	APC 12.
325 IAC 1.1-5	Malfunctions	APC 11.
325 IAC 1.1-6	Stack Height Provisions	Part of APC 13, APC 23.
325 IAC 1.1-7	Miscellaneous Provisions	Part of APC 13, APC 15, APC 23.
325 IAC 2-1	Permits, PSD, Emission Offset	APC 19.
325 IAC 3-1	Continuous Monitoring of Emissions	APC 8.
325 IAC 4-1	Open Burning Limitations	APC 2.
325 IAC 4-2	Incinerator Limitations	APC 7.
325 IAC 5-1	Visible Emission Limitations	APC 3.
325 IAC 6-1	Particulate Emissions for Nonattainment Areas	APC 23.
325 IAC 6-1-8[1]	Dearborn County	APC 23, Appendix A.
325 IAC 6-1-9[1]	Dubois County	Do.
325 IAC 6-1-10[1]	Lake County TSP Point Source Strategy	Do.
325 IAC 6-1-11[1]	Lake County Fugitive Emission Strategy	Do.
325 IAC 6-1-12[1]	Marion County	Appendix A.
325 IAC 6-1-13[1]	Vigo County	Do.
325 IAC 6-1-14[1]	Wayne County	Do.
325 IAC 6-1-15[1]	Howard County	Do.
325 IAC 6-1-16[1]	Vanderburgh County	Do.
325 IAC 6-1-17[2]	Clark County	Do.
325 IAC 6-1-18[2]	St. Joseph County	Do.
325 IAC 6-2	Particulate Emission Limitations for Indirect Heating Sources	APC 4R.
325 IAC 6-3	Particulate Emission Limitations for Process Operations.	APC 5.
325 IAC 6-4	Maximum Allowable Fugitive Dust	APC 20.
325 IAC 7-1	Sulfur Dioxide Emission Limitations	APC 13.
325 IAC 7-1-6	Sulfur Dioxide Emission Limitations for LaPorte, Lake, Marion, and Vigo Counties	APC 13, Appendix A.
325 IAC 8-1	Volatile Organic Compound Emission Limitations	APC 15.
325 IAC 9-1	Carbon Monoxide Emission Limitations	APC 16.
325 IAC 10-1	Nitrogen Oxide Emission Limitations	APC 17.
325 IAC 11-1	Particulate Emission Limitations for Certain Foundries	APC 6.
325 IAC 11-2	Sulfuric Acid Plants	APC 10.
325 IAC 11-3	Coke Oven Batteries	APC 9.
325 IAC 11-4	Fiber Glass Insulation Manufacturing	Part of APC 23.
325 IAC 12-1 thru 18	New Source Performance Standards	Part of APC 23, APC 13, APC 3.

[1] October 6, 1980 Codification Numbers changed by letter dated January 29, 1981.
[2] Codification numbers assigned by letter dated March 18, 1981.

EPA proposes to approve the codification of the IAPCB Regulations from APC 1 through APC 23 to 325 IAC 1.1 through 325 IAC 12.18. It should be noted that this proposed approval is directed specifically to the codification numbering system change, not to the substance within each of the codified rules.

325 IAC 6-3 Particulate Emission Limitations for Process Operations (APC 5)

The October 6, 1980 submittal which codified APC 5 to 325 IAC 6–3 also included a substantive change to the process operation emission limitations. Section 2 of the rule has specific emission limitations for cement kilns and catalytic cracking units which commenced operation prior to December 6, 1968. Section 2(c) is a process weight table which has general applicability for all process sources. Although it is presumed that the applicable rule for catalytic cracking units or cement kilns which commenced operation after December 6, 1968 is the process weight table in section 2(c) this is not specifically stated and should be clarified. EPA proposes to approve this revision to 325 IAC 6–3 provided that the State during the public comment period confirms that catalytic cracking units or cement kilns which commenced operation after December 6, 1968 are subject to the process weight table in section 2(c).

325 IAC 1.1-3 Redesignation of Vigo County for TSP

On May 26, 1981 the State submitted Rule 325 IAC 1.1-3, Vigo County TSP Nonattainment Area Redesignation and the technical support documentation and requested that EPA redefine the primary TSP nonattainment designation boundaries in Vigo County. The State requested that Honey Creek, Otter Creek, and Sugar Creek Townships be redesignated from primary nonattainment to attainment, leaving only Harrison Township designated as primary nonattainment in Vigo County.

The State submitted eight quarters of representative quality assured monitoring data showing no violations of the NAAQS for TSP, in the areas requested to be redesignated, and a modeling analysis. Due to numerous deficiencies, (See Vigo County Part D SIP discussion in this notice) the modeling data cannot be used to support the redesignation request.

However, the monitoring data submitted by the State indicates that Harrison Township is primary nonattainment and the remaining five townships can be properly reclassified

as attainment. Therefore, EPA proposes to redesignate Honey Creek, Fayette, Lost Creek, Otter Creek, and Sugar Creek Townships as attainment of the primary and secondary NAAQS for TSP Harrison Township remains designated as primary nonattainment of the NAAQS for TSP.

Interested individuals are advised that a 30 day public comment period is being provided on this notice of proposed rulemaking. Public comments received on or before April 2, 1982 will be considered in EPA's final rulemaking.

A thirty day comment period is being provided to enable publication of final action on this submission as expeditiously as possible. Final action approving this revision would satisfy one of the requirements of a Part D SIP. Until the State has an approved Part D SIP, it is subject to the new source growth prohibitions of section 110(a)(2)(1) of the Clean Air Act. EPA believes that the thirty days will provide the public with ample time to review and comment on today's proposed rulemaking. All comments received will be available for inspection during normal business hours at the Region V Office listed at the front of this notice.

Final promulgation of this proposed action will follow analysis of the comments received and will depend on consistency with Sections 107, 110, and 172 et seq. of the Act.

Under Executive Order 12291 (Order), EPA must judge whether a regulation is "Major" and, therefore, subject to the requirements of a Regulatory Impact Analysis. Today's action does not constitute a Major regulation because it primarily proposes to approve or conditionally approve provisions adopted by the State and submitted to EPA. Where EPA proposes to disapprove revised provisions, existing approved regulations will remain in effect and satisfy the requirements of Part D of the Act. This action, if promulgated, will remove the restrictions on industrial growth contained in Section 110(a)(2)(I) of the Act for TSP for the areas in Indiana covered by this action. This regulation was submitted to the Office of Management and Budget (OMB) for review as required by the Order.

(Secs. 107, 110, 172, and 301(a) of the Clean Air Act, as amended (42 U.S.C. 7407, 7410, 7502, and 7601(a)))

Dated: August 17, 1981

Valdas V. Adamkus,

Regional Administrator.

Pursuant to the provisions of 5 U.S.C. section 605(b) I hereby certify that the attached rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. This action approves, conditionally approves and disapproves state actions. For approval and/or conditional approval it imposes no new requirements beyond those which the State has already imposed. For disapprovals the sources will remain subject to the applicable provisions of the Indiana TSP plan. Thus no additional requirements will be imposed on these sources.

Dated: February 27, 1982

John E. Daniel,

Acting Administrator.

[FR Doc. 82-5777 Filed 3-2-82; 8:45 am]

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DEC 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-512

In the Supreme Court of the United States

OCTOBER TERM, 1982

PUBLIC SERVICE COMPANY OF INDIANA, INC., PETITIONER

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND ANNE M. GORSUCH

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Administrator of the Environmental Protection Agency has authority under the Clean Air Act to approve that portion of a revision to a state implementation plan which complies with all statutory requirements and to disapprove that portion of the revision which does not.

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In the Supreme Court of the United States

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PUBLIC SERVICE COMPANY OF INDIANA, INC., PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A3-A36) is reported at 682 F.2d 626. The opinion of the district court (Pet. App. A37-A50) is reported at 509 F.Supp. 720.

JURISDICTION

The judgment of the court of appeals was entered on June 25, 1982 (Pet. App. A51). The petition for a writ of certiorari was filed September 27, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Clean Air Act, as amended in 1970, Pub. L. No. 91-604, 84 Stat. 1976,[1] established a federal-state

[1]After the 1970 Amendments, the Act was codified at 42 U.S.C. (1976 ed.) 1857 *et seq.* In 1977, the Act was again amended and was recodified at 42 U.S.C. (Supp. I) 7401 *et seq.* Citations herein are to the present codification at Supplement I of 42 U.S.C. unless otherwise stated. The provisions of the Act relevant to this case were not materially changed by the 1977 Amendments.

partnership which recognized that "the prevention and control of air pollution at its source is the primary responsibility of States and local governments." Section 101(a)(3), 42 U.S.C. 7401(a)(3). The Act directed the Environmental Protection Agency ("EPA") to establish primary and secondary National Ambient Air Quality Standards ("NAAQS") for "each air pollutant for which air quality criteria have been issued." Section 109(a)(1)(A), 42 U.S.C. 7409(a)(1)(A).[2] The Act also required each state to adopt a state implementation plan ("SIP") imposing emission limitations upon sources of air pollution and containing such other measures as were necessary to ensure attainment and maintenance of the NAAQS by the statutory deadline. Sections 107(a) and 110(a), 42 U.S.C. 7407(a) and 7410(a). The Act directed each state to submit its SIP to the Administrator of EPA for approval or disapproval of "such plan, or any portion thereof." Section 110(a)(2), 42 U.S.C. 7410(a)(2).

The Administrator was required to approve the SIP if he found that it provided for timely attainment and maintenance of the NAAQS and otherwise complied with the Act's requirements. Section 110(a), 42 U.S.C. 7410(a). However, if the Administrator found that the SIP failed to comply with any of the Act's requirements, he was directed to disapprove those portions of the SIP that failed to comply and promulgate regulations to establish a lawful SIP for the state. Section 110(c)(1), 42 U.S.C. 7410(c)(1). The Act authorized each state to revise its SIP as necessary and empowered the Administrator to approve "any revision of an implementation plan" if the revised SIP would continue to ensure the attainment and maintenance of the NAAQS. Section 110(a)(3)(A), 42 U.S.C. 7410(a)(3)(A). Generally,

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[2]Pursuant to this authority, the Administrator has promulgated primary and secondary NAAQS for sulfur dioxide (SO_2), particulate matter, carbon monoxide (CO), nitrogen dioxide (NO_2), hydrocarbons (HC), photochemical oxidants and lead. 40 C.F.R. Part 50.

once a SIP is approved, it remains effective until the Administrator approves a revision to the plan. See *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60, 92 (1975).

2. Pursuant to this regulatory scheme, the State of Indiana submitted a SIP to EPA for approval in January 1972. That SIP contained a provision called Rule APC-3 ("1972 APC-3") entitled "Smoke and Other Visible Emissions" which imposed a limitation on smoke emissions from any combustion source of 40% opacity[3] with some limited exceptions. This provision was approved. See 37 Fed. Reg. 10842, 10864 (1972); 40 C.F.R. 52.773 and 52.776(c) (Pet. App. A122-A152).

In November 1974, Indiana rewrote Rule APC-3 ("1974 APC-3") and submitted it to EPA for approval as a SIP revision. The 1974 APC-3, entitled "Visible Emissions and Malfunctions," continued the 1972 APC-3's maximum opacity limitation of 40% (Pet. App. A94-A95),but it also created for the first time an exemption to the opacity limitation permitting a source to exceed the limitation for a total of 15 minutes each 24-hour period (*ibid.*).[4] On October 28, 1975, the Administrator approved most of the 1974 APC-3 as a revision to Indiana's SIP. 40 Fed. Reg. 50032 (Pet.

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[3]Opacity is defined in 40 C.F.R. 60.2 as "the degree to which emissions reduce the transmission of light and obscure the view of an object in the background." Opacity generally is measured by the so-called Ringelmann chart which is referred to in APC-3. The Ringelmann chart is defined in APC-1 as "[t]he chart published and described in the U.S. Bureau of Mines Information Circular 8333, and on which are illustrated graduated shades of gray to black for use in estimating the light obscuring power of smoke." 3 Ind. Admin. R. 325 IAC 1-1-2.

[4]The amended version also provided temporary exemptions from the opacity limitation for periods of start-up, soot-blowing, or malfunctions. It continued to equate violations of the opacity limitations with violations of the applicable particulate emission limitation (Pet. App. A94-A98).

App. A159-A165). However, the Administrator disapproved the 15-minute exemption period because Indiana had failed to demonstrate that this new exemption would not interfere with the attainment and maintenance of the NAAQS (*id.* at A159-A162).[5]

3. On January 7, 1980, EPA applied to the United States District Court for the Southern District of Indiana for warrants to inspect two electric generating stations owned by petitioner Public Service Company of Indiana, the Gibson Station in Gibson County, Indiana and the Wabash River Generating Station near Terre Haute, Indiana. The warrant applications were based upon EPA's broad statutory monitoring and inspection powers[6] and affidavits demonstrating probable cause to believe that the stations were in violation of APC-3 (Pet. 5-6; Pet. App. A5-A6,

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[5]In so doing, the agency found that the exemption appeared superfluous for power companies:

> New APC-3, the visible emission regulation, varies from the approved regulation in several respects, the most significant of which is the introduction of a 15-minute exemption period in each 24-hour period. The power companies submitted comments to the effect that such an exemption is necessary for them when starting fires or cleaning units. Since sections 2(a) and 2(b) of APC-3 already provide an exemption to visible emission requirements for fuel-burning sources in such circumstances, this comment appears to be superfluous.

(Pet. App. A161). In the courts below, petitioner contended (*id.* at A8, A45-A46) that EPA had not in fact approved the 1974 version of APC-3. Both courts rejected that argument (*id.* at A19-A22, A46) and petitioner has specifically stated that it is not seeking review on that issue (Pet. 5 n.3).

[6]Section 114(a)(2) of the Clean Air Act, 42 U.S.C. 7414(a)(2), grants to EPA's Administrator "or his authorized representative" the right to enter and inspect premises occupied by the owner or operator of an emission source. The petition does not challenge the constitutionality or applicability of this provision.

A42-A45).[7] The district court issued the two warrants. After the inspections had taken place, petitioner unsuccessfully moved to quash the warrants (*id.* at A6).

Petitioner then filed this action in the district court seeking declaratory and injunctive relief (Pet. App. A6). So far as relevant here, petitioner sought a declaratory judgment that the 1974 APC-3 was not enforceable because it was not part of the federally approved Indiana SIP. Petitioner argued that the Administrator had no statutory authority to approve only part of a SIP revision and that his approval of the 1974 APC-3 without the 15-minute exemption included by Indiana rendered the entire approval invalid (*id.* at A45-A47).[8] The district court, denying all relief, rejected this argument and held that the challenged actions of the EPA were proper (*id.* at A6, A41).

The Seventh Circuit affirmed. The court of appeals held that the Administrator's authority to approve SIP revisions was co-extensive with his authority to approve initial SIPs in general and that the Administrator's partial approval of the 1974 APC-3 was an appropriate exercise of that

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[7]Both applications recited concern over violations of APC-3 based upon continuous monitoring data submitted by petitioner to the Indiana Air Pollution Control Division (Pet. App. A44-A45). Warrants were sought after EPA inspectors at both facilities were denied admittance because they refused to sign a "Visitor's Admission Agreement" which contained a waiver of liability provision (*id.* at A5, A41-A42).

[8]Petitioner also sought (1) a declaratory judgment that the warrants were not supported by probable cause, authorized overly broad inspections, and authorized the seizure or demand of documents stored at locations other than those specifically authorized for inspection, and (2) injunctive relief preventing future inspections and enforcement actions resulting from information obtained pursuant to those warrants (Pet. App. A42). The court of appeals affirmed the district court's disposition of these issues against petitioner (*id.* at A26).

authority (Pet. App. A13-A19).[9] At the outset of its discussion of petitioner's argument, the court of appeals noted that EPA's construction of the Clean Air Act was entitled to considerable deference (*id.* at A13). See *Train* v. *Natural Resources Defense Council, Inc., supra,* 421 U.S. at 87. The court of appeals found that the purpose of the Administrator's approval power over the inital SIPs and SIP revisions was identical: "to ensure that the state's SIPs comply with the minimum requirements of [Section 110(a)(2)(A)-(K)] 42 U.S.C. § 7410(a)(2)(A)-(K)" (Pet. App. A14). The court then noted that, while Section 110(a)(2) authorizes the Administrator to approve or disapprove the original SIP "or any portion thereof" and Section 110(a)(3) authorizes approval simply of any "revision," the two provisions could be read consistently.

Applying this Court's definition of the term "revision" in *Train, supra,* 421 U.S. at 89, as "a change in the plan itself which deletes or modifies [a] requirement," the court of appeals held that Section 110(a)(3) authorizes the Administrator to approve or disapprove any change in a SIP which differs from the original SIP (Pet. App. at A14). The court of appeals found that this reading of the statute was consistent with the purpose of the approval process, that is, to

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[9]In the court of appeals, EPA contended that petitioner's challenge to EPA's partial approval authority was time-barred and was brought in the wrong federal court (Appellee's Br. 35-37). Section 307(b) of the Clean Air Act, 42 U.S.C. 7607(b), as it existed in 1975, required that challenges to the Administrator's approval of a SIP revision be made by petitioning the appropriate court of appeals within 30 days of the action in question. Because of Section 307(b)'s time bar and its designation of the court of appeals as the initial forum for judicial review, EPA contended that district court jurisdiction was wholly lacking in this case. The Seventh Circuit agreed that "issues relating to the Administrator's rationale for partially approving the 1974 APC-3" were time-barred (Pet. App. A22-A23 & n.17), but held that it did have jurisdiction to consider "the general issue of the Administrator's power to partially approve a revision" (*id.* at 23 n.17).

ensure the ongoing attainment and maintenance of the NAAQS (*id.* at A14-A15). The court rejected petitioner's argument that the Administrator's authority should be limited to verbatim approval of revisions to SIPs, finding that it "would elevate form over substance" to limit the Administrator to approving or disapproving the entire revision to a SIP when only one portion of the revision was inconsistent with the Act's requirements (*id.* at A14-A15).[10]

ARGUMENT

The decision of the court of appeals is correct, it does not conflict with the decisions of this Court or any other court of appeals, and does not warrant further review.

1. Petitioner suggests (Pet. 7-12) that the decision below conflicts with this Court's decisions in *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60 (1975), and

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[10]In reaching this result, the court of appeals rejected petitioner's argument that partial approval would permit the Administrator to approve something not actually adopted by the state. The court noted (Pet. App. A16) that the Administrator "is clearly permitted by [Section 110(a)(2),] 42 U.S.C. § 7410(a)(2)" to approve portions of the original SIP and that "[a]ppellant has provided no reason why regulations should be severable for approval purposes when submitted as part of the original SIP but not when they are submitted as revisions to the SIP" (Pet. App. A16). The court noted further (*id.* at A15-A16) that the cases cited by petitioner in support of its contrary proposition, *Citizens for a Better Environment* v. *EPA*, 649 F.2d 522 (7th Cir. 1981); *Illinois* v. *Celotex Corp.*, 516 F. Supp. 716 (C.D. Ill. 1981); *Sierra Club* v. *Indiana & Michigan Electric Corp.*, No. NA 81-8-C (S.D. Ind. June 5, 1981); *Sierra Club*, v. *Indiana Kentucky Electric Corp.*, No. NA 81-7-C (S.D. Ind. May 11, 1981), were inapposite because they simply held that EPA cannot approve state regulations which were improperly promulgated by the state and therefore invalid when submitted to the agency.

In addition, the court of appeals rejected petitioner's reliance upon *District of Columbia* v. *Train*, 521 F.2d 971 (D.C. Cir. 1975), vacated, 431 U.S. 99 (1977). The court found that the holding in that case that the EPA is not authorized to require the states to submit an adequate SIP or additional provisions thereto was not relevant to this case (Pet. App. A16-A18).

Union Electric Co. v. *EPA*, 427 U.S. 246 (1976). Petitioner correctly notes that the Court found in those cases that Congress intended, in adopting the Clean Air Act, to grant the states primary authority to choose their own "mix of limitations" subject to the condition that the mix would be sufficient to achieve minimum national air quality standards.[11] However, contrary to petitioner's assertion (Pet. 7, 12), that principle was not violated here. The court of appeals decided only that the Administrator's authority to act upon SIP revisions under Section 110(a)(3) is coextensive with his authority to act upon initial SIPs under Section 110(a)(2). In so deciding, the court below gave appropriate deference to the Administrator's interpretation of the statute as permitting him to "approve or disapprove" each revision or "each portion thereof" as required by *Train, supra*, 421 U.S. at 87. Indeed, it would be difficult to endorse the anomalous interpretation of the Act urged by petitioner, which would permit the Administrator to approve or disapprove "each portion" of the initial SIP under Section 110(a)(2), but deny the Administrator this same power in the case of SIP revisions submitted under Section 110(a)(3).

The record shows that in 1974 Indiana exercised its primary responsibility under the Act by adopting a revision to Rule APC-3 of its initial SIP provision in 1974 (Pet. App. A7, A94-A95). That revision was submitted to EPA for review to determine its consistency with the requirements of Section 110(a) for the timely attainment and maintenance of the NAAQS. The Administrator approved the 1974 APC-3 with the exception of the 15-minute exemption provision because he found that the exemption could interfere with the attainment and maintenance of air quality standards

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[11] *Train, supra*, 421 U.S. at 79, 86-87; *Union Electric Co.* v. *EPA*, *supra*, 427 U.S. at 267, 269.

and that Indiana had not demonstrated the contrary as required by EPA regulations (*id.* at A19-A22, A159-A165).[12] As the court of appeals held, that action is consistent with the Administrator's authority under the Act and does not conflict with *Train's* allocation of roles between the states and EPA.[13]

The court of appeals also was correct in rejecting petitioner's contention that the Administrator's disapproval of the 15-minute exemption in the 1974 APC-3 required EPA to reject the 1974 APC-3 in its entirety and instead promulgate a federal regulation under Section 110(c)(1) of the Act affirmatively adopting the acceptable portions of the 1974 APC-3. The court of appeals found that this procedure would serve no purpose here, where the partially approved revision was completely satisfactory and a substitute federal regulation thus would be superfluous (Pet. App. A17). As

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[12]Petitioner erroneously contends that no public hearings were held on "EPA's resulting more stringent regulation, restricting all emissions in excess of 40% opacity" (Pet. 5). The record indicates otherwise. Public hearings were held for both the original 1972 APC-3 (Pet. App. A93) and for the 1974 APC-3 (*id.* at A153), both of which contained this standard.

[13]As a factual matter, petitioner is mistaken in its assertion that the Administrator's disapproval of 1974 APC-3's 15-minute exemption altered Indiana's choice of its "mix" of emission limitations (Pet. 8-11). In substance, the 1974 APC-3 strengthened the 1972 APC-3 by expanding its coverage to all "visible emissions" instead of "smoke" alone, and by extending the 1972 APC-3 to "any equipment" rather than simply "any combustion installation" (Pet. App. A94, A-95). At the same time, the 1974 APC-3 weakened the 1972 APC-3 by creating the 15-minute exemption for emissions (*id.* at A95). The 15-minute exemption was defended as necessary to permit power companies to start fires and clean units (*id.* at A161). As the Administrator found, however, other provisions of the 1974 APC-3 already addressed these concerns (*ibid.*). Consequently, the Administrator's disapproval of the 15-minute exemption did not alter Indiana's articulated "mix" of emissions limitations in any relevant way.

the court found, the approach followed here was no different from the Administrator's unquestioned power to partially approve initial SIPs (*id.* at A18 & n.12).[14]

2. The court of appeals also held that judicial review of the merits of the Administrator's disapproval of the 15-minute exemption was time-barred in 1975 by the then-applicable 30-day deadline of Section 307(b) of the Act (42 U.S.C. 1857h-5(b)).[15] However, the court concluded that it possessed sufficient jurisdiction to determine the threshold issue whether EPA could partially approve a SIP revision, a question it resolved in EPA's favor (Pet. App. A13-A19). Petitioner contends (Pet. 20-22) that the court erred in applying the Section 307(b) 30-day deadline to bar further review because partial approval is not final agency action. The same claim was raised below and rejected in a factual finding (Pet. App. A19-A22, A46) that EPA clearly identified its partial approval as final action subject to Section 307(b)'s jurisdictional time bar.[16] Further review of this

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[14]Moreover, as petitioner concedes elsewhere (Pet. 17 n.15, 18), it is clear that Section 110(c)(1) does not apply to SIP revisions such as the 1974 APC-3 that a state submits voluntarily. Section 110(c)(1) applies only (a) when a state does not submit an initial SIP at all, (b) where the initial SIP does not meet the Act's requirements, and (c) where the Administrator notifies the state that its SIP is substantially inadequate and the state fails to file a revised SIP. 42 U.S.C. 7410(c)(1)(A)-(C).

[15]This deadline was extended by Congress to 60 days in 1977. However, petitioner is time-barred under the extended deadline as well. Compare 42 U.S.C. (1976 ed.) 1857h-5(b) and 42 U.S.C. (Supp. I) 7607(b).

[16]The court distinguished (Pet. App. A23-A26) *Utah International, Inc.* v. *EPA*, 478 F.2d 126 (10th Cir. 1973), upon which petitioner continues to rely, as a case in which petitioners sought review of an EPA order proposing new regulations to replace disapproved portions of a state SIP. The Tenth Circuit dismissed the petition because it did not challenge a final agency action. The Seventh Circuit found that, unlike the proposed order in that case, the action here was plainly a final order of the agency (Pet. App. A24). That decision is correct, and petitioner has stated that it is not challenging the factual decision that the order was final (*id.* at 5 n.3).

fact-bound jurisdictional determination is thus unwarranted. Nevertheless, EPA adheres to its previous position (see note 9, *supra*) that the time bar of Section 307(b) totally deprived the courts below of subject matter jurisdiction in every respect. See *Mansfield, Coldwater & Lake Michigan Ry.* v. *Swan*, 111 U.S. 379, 382 (1884), quoted in *Insurance Corp. of Ireland* v. *Compagnie des Bauxites de Guinee*, No. 81-440 (June 1, 1982), slip op. 8.

3. Finally, the petition raises no issue of national importance justifying a grant of certiorari. Petitioner describes the decision below as permitting EPA to utilize a "blue-pencil" approach to the approval of SIP revisions adopting any bits and pieces of revisions which it likes and dropping those which it does not like (Pet. 13-14). This is a gross mischaracterization. The decision merely holds that the Administrator's authority to approve revised SIPs coincides with his authority to approve initial SIPs. The Administrator must approve both if they meet the attainment and maintenance requirements of Section 110. Sections 110(a)(2)-(3), 42 U.S.C. 7410(a)(2)-(3). The decision below does not alter this objective test.

Petitioner insists (Pet. 11-12) nonetheless that this test is insufficient to protect the rights of the State of Indiana because it permits EPA, rather than Indiana, to choose "the proper mix of emissions limitations." Leaving to one side the validity of this argument as a factual matter, see note 13, *supra*, we stress that the State of Indiana did not object in 1975 to the Administrator's partial approval of the 1974 APC-3, nor did it seek judicial review of the action. Only in this Court has Indiana's Air Pollution Control Board indicated a desire to participate, and even then only in the limited capacity of *amicus curiae*, not as an intervenor

testing a claimed right.[17] Petitioner, which is not authorized by Indiana's governor or its attorney general to speak on behalf of the State, has been and remains the sole challenger of the Administrator's partial approval of the 1974 APC-3. Under these circumstances, petitioner does not have standing to argue that the rights of the State of Indiana have been violated. *Mountain States Legal Foundation* v. *Costle*, 630 F.2d 754, 771 (10th Cir. 1980); *Pacific Legal Foundation* v. *Gorsuch*, Nos. 81-4442 and 81-7060 (9th Cir. Oct. 20, 1982). Aside from these problems, the facts petitioner relies upon simply show that Indiana is in the process of revising APC-3 again (Pet. 5 & n.4; Pet. App. A98, A178, A195-200, A112, A244, A251-252). This ongoing revision is expressly provided for by the statute. Section 110(a)(3), 42 U.S.C. 7410(a)(3).

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[17]The Indiana Air Pollution Control Board has moved pursuant to Rule 36.4 of this Court for leave to file an *amicus curiae* brief in support of the petition. Respondent does not object to the filing of this brief. It bears emphasis, however, that this marks the first time that the Board has seen fit to announce to any court its objections to the legality of EPA's partial disapproval of the 1974 APC-3 seven years ago. And, as the Board admits (Amicus Br. 4-5), it has since submitted two revisions of APC-3 for EPA's approval.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 82-512

In the Supreme Court of the United States

OCTOBER TERM, 1982

PUBLIC SERVICE COMPANY OF INDIANA, INC.,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and ANNE M. GORSUCH,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR CERTIORARI

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EPA's Brief in Opposition to the petition for certiorari dramatically illustrates why the decision of the Court of Appeals is both erroneous and deserving of review by this Court. Although EPA pays lip service to the principle that the States have "primary authority to choose their own 'mix of [emission] limitations' " under the Clean Air Act (Opp. Br.

at 8), the Agency does not so much as *mention* the principle actually involved in this case—that the States *also* retain *"continuing authority to revise"* their choices as to the mix. *Train* v. *Natural Resources Defense Council*, 421 U.S. 60, 87 (1975) (emphasis supplied). Nor does EPA discuss at all the effect of its claimed "partial approval" power upon the Act's "mechanism" for effectuating those "developing policy choices"—State submission of voluntary SIP revisions pursuant to 42 U.S.C. § 7410(a)(3)(A). *Train*, 421 U.S. at 80.

EPA's Brief makes crystal clear that the Agency recognizes *no* limitations upon its power to alter a State's voluntary SIP revision other than those that pertain to the Agency's approval of original SIPs. (Opp. Br. at 5, 8, 11.) That interpretation of the Agency's authority, upheld by the Court of Appeals, transforms the Act's "mechanism" for exercise of the State's authority into a decidedly risky adventure at best and at worst, as starkly illustrated by this case, a cruel joke.

I. EPA's Claimed Authority Selectively To Approve And Disapprove Portions Of A Voluntary SIP Revision Plainly Impairs The States' Continuing Authority To Revise Their Mix Of Emission Limitations And Permits Patent Evasion Of The Act's Procedural Safeguards.

Elementary logic as well as this Court's analysis in *Train* dictate that the State's "continuing authority" to revise its previously chosen means of achieving national air quality standards is not limited to the authority to *expand* the scope of existing state restrictions. If the State truly may choose to "develop [new] policy choices," that must mean that the State is free to relax or abolish existing restrictions while simultaneously adopting or expanding others, provided only that the revised mix as a whole remains adequate to achieve minimum national standards. So long as the decision below stands in affirmation of EPA's claimed "partial approval" authority, however, States may attempt voluntary revision only if they are willing to risk unknown and unpredictable EPA modifications of State submissions *and* immediate EPA enforcement of the remainder. In the process, the State is

denied any opportunity to choose to continue under its existing SIP rather than to accept EPA's version of its revision.

That is the result in this case. Indiana voluntarily proposed expanding the scope of 1972 APC-3 beyond "combustion installations" to all "equipment" and beyond "smoke" to all "visible emissions" on the one hand, while granting a 15-minute per day exemption to previously and newly covered sources on the other. (Pet. at 3-4.) EPA then "disapproved" the 15-minute exemption, but "approved" and immediately federally enforced the expansion to all equipment and all visible emissions. (*Id.* at 4-5.)

EPA portrays petitioner's argument that the decision below permits EPA to adopt "any bits and pieces of revisions which it likes and [to drop] those which it does not like" as a "gross mischaracterization." (Opp. Br. at 11.) But EPA plainly recognizes no limitation whatever upon its power to do exactly what petitioner argued (Pet. at 13-14.) Indeed, EPA urges that the decision of the Court of Appeals "holds that the Administrator's authority to approve revised SIPs"—making no distinction between voluntary revisions and those required to meet the standards of the Act—"coincides with his [sic] authority to approve initial SIPs. The Administrator must approve both if they meet the attainment and maintenance requirements of Section 110 .... The decision below does not alter this objective test." (Opp. BR. at 11)

"This objective test" is a polite way of saying that EPA may, at its option, sandbag any State that seeks voluntarily to revise its existing mix. Since the Act permits state rules more restrictive than required to meet minimum national standards, *Train*, 421 U.S. at 79, 98; *Union Electric Co.* v. *EPA*, 427 U.S. 246, 265 (1976), those portions of a voluntary SIP revision that *expand* the scope of existing restrictions will always be approved and enforced by EPA under its "objective test," whether or not the State would have chosen those increased restrictions had it known that its concomitant relaxation of other restrictions would be disapproved.

As petitioner originally argued, no statutory language authorizes and no statutory policy is served by permitting EPA to "partially approve" voluntary SIP revisions. (Pet. at 12-14.) By contrast, national air quality standards are preserved if EPA's authority is limited to the Act's express terms—to approve or disapprove "any revision," 42 U.S.C. § 7410(a)(3)(A)—because disapproval of a voluntary revision leaves in effect an existing adequate SIP previously chosen by the State.

Equally important, limiting EPA to approval or disapproval of a voluntary revision in its entirety leaves the State with the primary policy role that Congress conferred. If the State *wishes* to adopt EPA's version of a minimally adequate revision, the State is free to submit that version to EPA for the then-ministerial act of approval. If, on the other hand, the State would rather continue with the existing SIP instead of adopting the "approved" increased restrictions absent the "disapproved" relaxation of restrictions, the State may choose that option as well. That choice is plainly denied under the "partial approval" authority exercised here and upheld by the Court of Appeals. EPA neither rebuts petitioner's argument nor offers *any* justification for that unfettered authority.

Nor does EPA address petitioner's argument that exercise of this "partial approval" authority rips a gaping hole in the Act's stringent procedural requirements governing the promulgation of Federal regulations. (*See* Pet. at 18-20.)

The decision of the Court of Appeals upholds EPA's statutory exegesis which injects the words "or any portion thereof" into the section of the Act governing EPA approval of revisions, 42 U.S.C. § 7410(a)(3)(A), words that on the face of the Act apply only to EPA approval of original SIPs. 42 U.S.C. § 7410(a)(2). At the same time, that decision permits EPA wholly to evade the procedural safeguards the Agency *must* follow, 42 U.S.C. §§ 7410(c)(1), 7607(d), when it approves only a "portion" of a state submission under the section of the Act that actually contains those words. Of particular relevance to the circumstances presented here, those proce-

dures require, *inter alia*, public hearings in the affected State on EPA's proposed regulations and allowing the State a second opportunity to choose means of its own. (*See* Brief in Support of Petition For Certiorari of the Indiana Air Pollution Control Board as Amicus Curiae, at 7-9.)

Petitioner does not concede that EPA has any authority to promulgate federal regulations pursuant to 42 U.S.C. § 7410(c)(1) when it disapproves a voluntary revision. In that circumstance the State is still in compliance with the Act because the pre-existing and federally adequate SIP remains in effect. (Pet. at 12-13, 18.) But if petitioner is wrong and EPA can create new federal regulations by "approving" in part and "disapproving" in part a voluntarily-submitted revision—regulations of a form never, as here, submitted by the State nor subsequently adopted or enforced by the State—then *surely* the Agency cannot do so without following those procedures required in circumstances where the Act *expressly authorizes* creation of federal regulations.[1]

Understandably, the Agency would like to have it both ways. EPA wants its administrative *powers* over voluntary SIP revisions construed expansively and as co-extensive with its powers over original SIPs. (Opp. Br. at 5, 8, 11.) But EPA does not want any concomitant expansion of the correlative procedural *duties* that arise when it exercises the identical power with respect to original SIPs. The perverse result, affirmed by the Court of Appeals, is that EPA is permitted to evade in the *voluntary revision* situation, where the State has done nothing wrong, those procedural safeguards intended by Congress to protect the State in circumstances where the State has defaulted its obligations under the Act.

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[1]Notably, EPA's version of the "Question Presented" states only one-half of the question. The question is not only whether EPA has statutory authority to "partially approve" a voluntary SIP revision, but also, if it does, whether such authority may be exercised without further administrative proceedings pursuant to the Act's procedural requirements. Having deleted this half of the Question Presented, EPA's Brief does not discuss it at all.

That is not only anomalous, but also cannot be countenanced under the principles of federalism Congress embodied in the Act.

II. The State And Not EPA Is The Proper Judge Of Whether A Particular Portion Of A Voluntary SIP Revision Is An Integral And Substantive Part Of The State's Decision To Revise Its Mix Of Emission Limitations.

Perhaps as camouflage for the issues it fails to address, EPA contends that the disapproved 15-minute exemption contained in Indiana's 1974 revision of APC-3 did not alter the State's pre-existing mix of emission limitations. (Opp. Br. at 9 n. 13, 11.) On its face, that contention is incredible—the same sentence of Indiana's proposed revision that so expanded the regulation's coverage also contained the exemption. (A-95.) Moreover, that contention ignores and denigrates the representations made to this Court by the Indiana Air Pollution Control Board. (Amicus Brief in Support, at 3-4.) Furthermore, EPA's verbal puffery cannot obscure what the State has made clear by deed as well as by word. Indiana has never adopted EPA's version of 1974 APC-3, has refused to enforce it, and has repeatedly sought to revise it by means more cooperative than the lawsuit EPA now faults the State for not bringing. (Opp. Br. at 11-12.)[2]

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[2]Moreover, EPA's contention is contradicted by its own representation to the Seventh Circuit less than a week after filing its Brief in this Court:

> EPA's action [on 1974 APC-3] clearly made the SIP more stringent than it would have been had EPA approved the revision in its entirety.

Brief For Respondent at 21, *Indiana & Michigan Electric Co.* v *United States Environmental Protection Agency*, No. 82-1733, and *Indianapolis Power & Light Company* v. *United States Environmental Protection Agency*, No. 82-1738, currently pending before the Seventh Circuit.

Congress gave the States, not EPA, the "continuing authority" to make new policy choices with respect to the emission limitations mix. *Train*, 421 U.S. at 80, 87. Congress gave the States, not EPA, the authority to make the political and economic tradeoffs that are integral to any decision voluntarily to revise a SIP. *Union Electric*, 427 U.S. at 269.[3] Accordingly, only the State, and not EPA, can judge whether any particular provision of a voluntary revision is an indispensible part of the revised choice. There is neither statutory nor policy justification for allowing EPA to render *ad hoc* judgments with respect to that issue. When EPA disapproves any aspect of a voluntary revision, the State can and must be permitted to make that judgment for itself.

III. EPA's Factual Misrepresentations And Legal Non-Sequiturs Should Not Adversely Influence This Court's Decision Whether To Accept This Case For Review.

Petitioner recognizes that the Court's decision whether to accept a case for review is not likely to be influenced by counsels' quibbling over minor legal points or factual inferences with respect to the record. However, three assertions made by the Agency in its Brief in Opposition are both inaccurate and central to the issue presented for review.

First, contrary to EPA's representation (Opp. Br. at 9 n.12), there is no evidence in this record that any public hearing was held on EPA's federal version of 1974 APC-3. In fact, no such hearing was ever held. The only hearings held with respect

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[3]The Act does not:

> permit the Administrator or a federal court to reject a State's legislative choices in regulating air pollution .... Congress plainly left with the States, so long as the national standards [are] met, the power to determine which sources [are to] be burdened by regulation and to what extent.

Union Electric, 427 U.S. at 269.

to 1974 APC-3 were on *Indiana's* fundamentally different regulation.[4] EPA's factual misstatement should not be permitted to obscure the significant point that the claimed administrative authority to edit a voluntary SIP revision, upheld by the Court of Appeals, permits evasion of the public hearing requirement every time EPA elects to exercise it.

Second, the implication that EPA is now surprised by Indiana's opposition to EPA's version of 1974 APC-3 (Opp. Br. at 11-12) is simply disingenuous. EPA has repeatedly observed that Indiana has not adopted or enforced EPA's version of 1974 APC-3. (*See* Pet. at 5.) Indeed, after the instant petition was filed, EPA again disapproved a Delayed Compliance Order issued by the State to Bethlehem Steel Corporation because that State Order "requires compliance with Indiana APC-3 as promulgated by Indiana" rather than "the APC-3 approved by EPA." 47 Fed. Reg. 43,378 (October 1, 1982). Furthermore, EPA's representation "that the State of Indiana did not object in 1975 to the Administrator's partial approval of the 1974 APC-3" is not only unaccompanied by any citation to the record (Opp. Br. at 11), it is wholly unsupported in this record and is flatly untrue. As EPA well knows, evidence EPA has agreed to place in the administrative record to be reviewed in *Bethlehem Steel Corp.* v. *Gorsuch,* No. 82-2884, currently pending before the Seventh

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[4]The State Agency which promulgated Indiana's version of 1974 APC-3 considered the 15-minute exemption crucial to its technical and economic feasibility and therefore necessary to its validity as a matter of State law. (Amicus Br. in Support, at 4.)

In *Union Electric,* 427 U.S. at 266-267, this Court stressed that the "most important forum for consideration of claims of economic and technical feasibility" is the public hearing before the state agency, and that state courts are the only forums for judicial review of such claims. By proceeding as it did, EPA deprived petitioner and other affected persons of both forums. No public hearing on the technical and economic feasibility of EPA's edited version of 1974 APC-3 was ever held. Moveover, it is at best doubtful that a state court would have jurisdiction to review these issues because the State has never adopted EPA's version of the regulation. (Pet. at 15.)

Circuit, demonstrates that Indiana objected from the beginning to EPA's "partial approval" of 1974 APC-3.

Third, EPA's contention that petitioner has no "standing to argue that the rights of the State of Indiana have been violated" (Opp. Br. at 12) partakes more of farce than legal argument. EPA cites as authority cases denying standing to a public interest organization which shows no injury in fact to itself or its members.[5] How those cases are authority for denying standing to petitioner which is subject to the contested regulation and has been subjected to search warrants issued on the basis thereof (Pet. at 5-6) is not and cannot be explained. EPA has not and cannot articulate why petitioner is barred from arguing those policy reasons that lead Congress to withhold from EPA the federal administrative authority to which petitioner now finds itself illegally subjected. And if EPA knows, it does not tell this Court why the United States may argue the rights of the States, *see* Brief for the United States at 45, and Reply Memorandum for Petitioners at 3, *Train* v. *Natural Resources Defense Council,* 421 U.S. 60, but a citizen of a State and a beneficiary of those statutory restrictions upon federal administrative authority may not.

This petition presents an opportunity to decide whether the Government's previous arguments to this Court regarding the revision section of, and State autonomy under, the Clean Air Act are promises to be fulfilled or empty litigation rhetoric to be invoked on EPA's expedient whim:

> The holding below . . . would result in unwarranted constriction of state autonomy to determine how the national standards should be attained and implemented

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[5] In *Mountain States Legal Foundation* v. *Costle,* 630 F.2d 754 (10th Cir. 1980), the public interest organization not only failed to show injury in fact, its arguments with respect to the rights of the State were contrary to the arguments made by the State itself. In *Pacific Legal Foundation* v. *Gorsuch,* 690 F.2d 725 (9th Cir. 1982), the organization failed to show injury in fact in a case raising only the constitutional rights of the State.

within each state. In providing for national air quality standards, Congress plainly meant to establish national ends to be achieved. But it did not intend comparably to nationalize decision-making about the means for achieving those ends—decisions whose economic, social and political dimensions are of particular concern to the states and localities most immediately affected by them.

Brief for the Unites States at 45, *Train* v. *Natural Resources Defense Council*, 421 U.S. 60.

CONCLUSION

For the reasons set forth, the Petition for Certiorari should be granted and the decision of the Court of Appeals for the Seventh Circuit should be reversed.

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No. 82-512

In the

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OCTOBER TERM, 1982

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Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and ANNE M. GORSUCH,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF OF THE INDIANA AIR POLLUTION CONTROL BOARD

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Comes now the Indiana Air Pollution Control Board, by its counsel, the Attorney General of Indiana, and files this Motion for Leave to file an Amicus Curiae Brief.

INTEREST OF INDIANA AIR POLLUTION CONTROL BOARD

The Indiana Air Pollution Control Board (APCB) is an agency of the State of Indiana created by statute, Indiana Code 13-1-1-3 (1982). APCB has the duty and power, pursuant to Indiana Code 13-1-1-4(3) (1982), to adopt and promulgate reasonable rules and regulations consistent with the general intent and purpose of the Air Pollution Control Board Act. Indiana Code 13-1-1-1 et seq. (1982). Indiana Code 13-7-5-1(c) (1982) and Indiana Code 13-7-7-1 et seq. (1982) also provide APCB with the authority to adopt rules and regulations relating to air quality in the State of Indiana. Further, Indiana Code 13-7-5-1(e) provides APCB may act for the State in the adoption of standards pursuant to any federal law regarding environmental protection of air. Indiana Code 13-7-2-10(c) (1982) designates APCB as the air pollution agency for the

State for all purposes of the Federal Clean Air Act, 42 U.S.C. §§ 7401-7642 (Supp. IV 1980).

Thus, in a cause wherein the rules of the State relating to air pollution control are at issue, APCB is uniquely qualified and authorized to support its rules.

GROUNDS FOR LEAVE TO FILE

The interest of the State of Indiana is represented in this brief by APCB. The State may file an Amicus Curiae Brief without consent of the parties. United States Supreme Court Rule 36.4. APCB's Amicus Curiae Brief could have been written then with a different caption and the Amicus Curia Brief would have been accepted automatically. Because of the last-minute "mandate" of APCB to the Attorney General to file an Amicus Curiae Brief herein, without time for input from the Governor, it was determined that the Amicus Curiae

Brief should be brought in the name of APCB. Yet, APCB only is authorized by the Indiana Code to act for the State of Indiana herein, Indiana Code 13-7-2-10(c) (1982), and should be allowed to intervene as the State.

APCB was informed of the issue herein after the Petitioner's Petition for Writ of Certiorari had already been filed. APCB may or may not still be able to obtain the consent of the parties. APCB filed its Brief in the reasonable belief that it could do so as the State without consent of the parties.

The issue left in the Petition for Writ of Certiorari is whether Environmental Protection Agency may partially adopt, rather than adopt in whole or reject, a State's revision to its State Implementation Plan (SIP) under the Clean Air Act, 42 U.S.C. §§ 7401-7642 (Supp. IV 1980).

Since it is Indiana's SIP at issue and the rule which APCB promulgated, both of which are APCB's responsibility, APCB has a real interest herein. The outcome of this cause must directly affect APCB and the State's entire air pollution control program. APCB's opinion and interpretation of the law is highly relevant and should be considered.

WHEREFORE, APCB prays that the United States Supreme Court grant its Motion for Leave to File an Amicus Curiae Brief.

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QUESTION PRESENTED FOR REVIEW

When the United States Environmental Protection Agency disapproves an integral portion of a regulation submitted by the State as a revision to its State Implementation Plan under the Clean Air Act, is the remaining portion of the regulation enforceable by the Agency if it is neither:

(1) Adopted by the State as a state regulation; nor

(2) Promulgated as a federal regulation pursuant to the provisions of the Act?

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THE INTEREST OF THE STATE OF INDIANA

The State, due to industries under the jurisdiction of the Indiana Air Pollution Control Board ("APCB"), are adversely affected by the decision of the Court of Appeals. The holding of this decision seriously undermines APCB's reponsibility and authority to revise its State

Implementation Plan ("SIP") under the Clean Air Act, 42 U.S.C. §§7401-7626 (Supp. IV 1980) (the "Act"). The decision allows the United States Environmental Protection Agency ("EPA"), without any notice, opportunity for comment, or public hearing, to delete integral portions of revisions to Indiana's SIP and immediately to enforce those revisions *as amended by EPA*, without giving APCB its opportunity to submit another regulation to EPA for review as required by Section 110(c)(1) of the Act. 42 U.S.C. §7410(c)(1) (Supp. IV 1980). The judicial affirmation of this far-reaching EPA authority to substitute its judgment for that of APCB impairs Indiana's statutorily-guaranteed freedom and responsibility to revise its SIP and to determine the appropriate mix of emission limitations applicable to critical Indiana industries. The APCB has a clear interest in seeking reversal of the Court of Appeal's decision.

SUMMARY OF THE STATE'S ARGUMENT

The decision below fundamentally alters the balance of powers between state and federal authority created by the Act. This Court has twice determined that the States, not EPA, have the primary authority under the Act to determine the appropriate "mix of emission limitations [they] deem[ ] best suited to [their] particular situations." *Train v. Natural Resources Defense Council*, 421 U.S. 60, 79 (1975); see also *Union Electric Co. v. EPA*, 427 U.S. 246, 250 (1976); 42 U.S.C. §7401(a)(3) (Supp. IV 1980). EPA may override the State's choices only in narrowly defined circumstances, and only by following mandatory procedures prescribed in the Act. 42 U.S.C. §§7410(c)(1), 7607(d) (Supp. IV 1980).

Nevertheless, the Court of Appeals' decision allows EPA to substitute its judgment for that of the State by simply drawing a line through an integral portion of the State's duly promulgated SIP revision, thereby substantially

changing the scope and meaning of that regulation. EPA may then immediately enforce the balance of the regulation as amended by EPA, without any notice, opportunity for comment, or public hearings. However, the Act does not permit EPA to create its own regulation in such a fashion. Because the decision below (1) usurps the States' primary role under the Act to develop and revise their SIPs; (2) expands EPA's authority far beyond that conferred by Congress; (3) directly affects the ongoing revisions of over fifty State Implementation Plans; and (4) effectively eliminates numerous procedural requirements from the Act, the Petition for Certiorari presents a question of national significance which should be decided by this Court.

ARGUMENT

I. The APCB Has Never Agreed With EPA's Claimed Authority To Revise And Has Consistently And Unsuccessfully Sought EPA Approval Of The Disputed Regulation As Well As Subsequent Revisions Thereto.

In 1968, the APCB promulgated a regulation called APC-3, which limited the "smoke" emitted from any "combustion installation" to 40% opacity. *1969 Editions and Revisions to Rules and Regulations (Indiana) 11.* APC-3 became a federally enforceable part of Indiana's "applicable implementation plan" when it was approved by EPA on May 31, 1972. 42 U.S.C. §§7410(d), 7413 (Supp. IV 1980); 37 Fed. Reg. 10,863-65 (1972). (This version of APC-3 is hereafter called "1972 APC-3").

In 1974, APCB amended APC-3 and submitted this SIP revision to EPA for approval or disapproval on November 8, 1974. ("1974 APC-3"). This revision was not prompted by an EPA finding under 42 U.S.C. §7410(a)(2)(H) (Supp. IV 1980), that 1972 APC-3 was inadequate, but was born out of APCB's desire to improve its air pollution control regulations. 1974 APC-3 was a complete revision of 1972

APC-3. On the one hand, coverage was expanded from "combustion installations" to "any equipment." On the other hand, the Board restricted the coverage of 1972 APC-3 by providing a 15-minute per day exemption from its 40% opacity restrictions. 325 IND. ADMIN. CODE 1-3 (1979). Thus, although the class of sources subject to APC-3 was enlarged, those sources would not violate the new regulation unless emissions occurred "for more than a cumulative total of 15 minutes in a 24-hour period." *Id.*

APCB considered the 15-minute exemption a critical and necessary part of its revised regulation. Many sources brought within the coverage of 1974 APC-3 could not, for economic and technological reasons, comply with the 40% opacity limit unless some exemption was provided. Consequently, 1974 APC-3 without the exemption would be invalid under Indiana law. IND. CODE §13-7-7-2 (1976, Cum. Supp. 1981). Not only was the exemption essential to 1974 APC-3's validity, but APCB reasoned that the additional adverse air quality impacts arising from the exemption would be *de minimus* and more than offset by the expansion of coverage to other sources.

As interpreted below, EPA's October 21, 1975 decision regarding 1974 APC-3 had the effect of approving 1974 APC-3's expansion of coverage while at the same time disapproving the exemption, and rendered the modified regulation, which was much more stringent than any opacity regulation ever promulgated by the State, immediately enforceable by EPA, and only by EPA. EPA never published any notice of intent to disapprove any portion of 1974 APC-3; the public, including APCB, was never given an opportunity to comment upon this amended regulation; and EPA's version of APC-3 ("EPA APC-3") was never subject to a public hearing, all in violation of the Act.

APCB has never accepted that EPA's October 21, 1975 action, standing alone, was sufficient to change a duly

promulgated State regulation or to create a federally enforceable regulation. The State has tried to eliminate this problem by twice seeking EPA's approval of new revisions of APC-3. On June 26, 1979, Indiana submitted a revised version of APC-3 to EPA for approval as a SIP revision. 325 IND. ADMIN. CODE 1-3.1 (1980 Supp.). On March 27, 1980, EPA published notice of its intent to disapprove that revision. 45 Fed. Reg. 20,432, 36-38 (1980). On October 6, 1980, Indiana submitted another revision to APC-3. 325 IND. ADMIN. CODE 5 (1982 Cum. Supp.). Although EPA has not taken final action on that submission, it published notice of its intent to disapprove on March 3, 1982. 47 Fed. Reg. 9020-21 (1982). As a result, EPA's version of APC-3, not APCB's version, has been enforced against Indiana sources of air emissions for nearly seven years in violation of the fundamental tenet of the Clean Air Act that the states are to develop the appropriate mix of emission limitations.

II. EPA Does Not Have The Authority To Approve Portions And Disapprove Portions Of Revisions To State Implementation Plans.

Although the Act grants EPA authority to make partial approvals of a state's original SIP, it does *not* permit EPA to make partial approvals of a state's revision to its original SIP. *Compare* 42 U.S.C. §7410(a)(2) (Supp. IV 1980) ("the Administrator shall... approve or disapprove such plan, or each portion thereof") with 42 U.S.C. §7410(a)(3) (Supp. IV 1980) ("the Administrator shall approve any revision of an implementation plan...."). The rationale for this different language is simple. Once the original plan is in place and is not found to be inadequate by EPA, disapproval of an entire SIP revision leaves the existing adequate SIP in force. This is not the case with the original plan. Rather than require wholesale rejection of the original plan thereby leaving nothing in effect, EPA was allowed to disapprove portions and to fill the gaps created by this selective disapproval with a federal

regulation if — *and only if* — the state thereafter failed to fill the gaps itself. 42 U.S.C. §7410(c)(1)(B) (Supp. IV 1980).

The provisions of Section 110(c)(1), 42 U.S.C. §7410(c)(1) (Supp. IV 1980), complement this statutory scheme. Section 110(c) authorizes and requires EPA to promulgate a federal SIP regulation in lieu of a state regulation in certain narrowly defined circumstances. Section 110(c)(1)(B) requires EPA to promulgate a federal replacement regulation if: (1) it disapproves the original SIP or any portion thereof; and (2) the state fails to submit an acceptable alternative. If a portion of the original SIP is disapproved, there is no existing SIP to fall back on, and EPA must promulgate a replacement regulation to fill that gap. There is no comparable provision permitting EPA to promulgate a federal regulation when it disapproves a portion of a voluntarily submitted SIP revision. This is because when EPA disapproves a SIP revision in full, there is an existing approved SIP to fall back on. No federal regulation is required because there is no gap to fill.

When EPA acted on 1974 APC-3, 1972 APC-3 was still a valid part of Indiana's applicable implementation plan. As stated by Petitioner at page 12 of its Petition, denying EPA its claimed authority to approve portions of a SIP revision not only is consistent with the statutory language, but also leaves the State with the primary authority to choose the appropriate mix of emission limitations. See *Train*, 421 U.S. at 79, 86-87; *Union Electric*, 427 U.S. at 269. APCB's options were to continue with 1972 APC-3, to adopt and submit EPA's version of 1974 APC-3, or to develop and submit an entirely new alternative. The decision below does not leave the primary responsibility for revising the appropriate mix of limitations with the State, but rather allows EPA to substitute its judgment for that of the State by simply drawing a line through portions of a State SIP revision it does not like, thereby substantially changing the meaning and scope of the State's regulation. And, as shown in section III below, that decision allows EPA to

accomplish this result in complete disregard for the procedures written into the Act by Congress.

III. The Statute Provides EPA With The Exclusive Avenue To Substitute Its Judgment For That Of The State.

There are only two ways a regulation becomes part of a state's "applicable implementation plan." The regulation may either be a state regulation approved by EPA under Section 110(a)(2), or a federal regulation promulgated by EPA under Section 110(c). 42 U.S.C. §7410(d) (Supp. IV 1980). Since it is clear that EPA APC-3 is not a State regulation, the only way it may be an enforceable part of Indiana's SIP is if it is a federal regulation.

Section 110(c)(1) provides the only mechanism Congress prescribed for EPA to develop and enforce federal regulations. There are only three circumstances in which EPA may promulgate a federal SIP regulation: first, if the state fails to submit an original SIP meeting the requirements of the Act, 42 U.S.C. §7410(c)(1)(A) (Supp. IV 1980); second, if EPA disapproves a state's original plan or any portion thereof, 42 U.S.C. §7410(c)(1)(B) (Supp. IV 1980); or third, if the state fails to revise its SIP after being notified by EPA that the state plan is inadequate. 42 U.S.C. §7410(c)(1)(C) (Supp. IV 1980).[1] The decision below allows a fourth, non-statutory circumstance in which EPA can delete portions of a voluntary state SIP revision and to create a federal replacement regulation without following the mandatory procedural requirements of the Act. *See* 42 U.S.C. §§7410(c)(1), 7607(d) (Supp. IV 1980).

If EPA felt that both 1972 APC-3 and 1974 APC-3 were inadequate, and that some other regulation was needed, it

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[1]It is clear that Section 110(c)(1) does not authorize or require EPA to develop a federal regulation when it disapproves a portion of state's SIP revision because the statute does not permit a partial disapproval of SIP revisions.

was required to disapprove 1974 APC-3 in its entirety and to notify Indiana that 1972 APC-3 was not sufficient to meet ambient air standards. 42 U.S.C. §7410(a)(2)(H) (Supp. IV 1980). If Indiana failed to promulgate a satisfactory replacement within 60 days of this notice, or such longer period as EPA might allow, EPA had a mandatory duty to promptly publish a proposed federal replacement regulation. If the State did not submit a satisfactory substitute within six months of the date established in the notice for Indiana to submit its new regulation, then, and *only* then, was EPA authorized to substitute its judgment for the State with its own regulation. The decision below rewrites this section of the Act by granting EPA another, non-statutory procedure for substituting its judgment for the State.

The decision also effectively eviscerates numerous statutory procedures enacted as part of the 1977 amendments to the Act which must be followed by EPA in developing a federal regulation when such a regulation is permitted. To develop such a regulation, EPA must:

(1) Establish a rulemaking docket available to the public in Washington, D.C. and in the appropriate regional EPA offices, 42 U.S.C. §7607(d)(2), (d)(4)(A) (Supp. IV 1980);

(2) Promptly publish notice of proposed rulemaking in the Federal Register, 42 U.S.C. §7410(c)(1), 7607(d)(3) (Supp. IV 1980);

(3) Establish a period for receiving public comments on the proposed regulation, 42 U.S.C. §7607(d)(3) (Supp. IV 1980);

(4) Hold a public hearing in the affected State on EPA's proposed regulation, 42 U.S.C. §7410(c)(1) (Supp. IV 1980);

(5) File all comments and the transcript of any public hearings in the docket, 42 U.S.C. §7607(d)(4)(B)(i) (Supp. IV 1980);

(6) Respond to all comments received, 42 U.S.C. §7607(d)(6)(B) (Supp. IV 1980); and finally

(7) Promulgate, and justify through reasoned decisionmaking, a final rule for the State.

The decision below allows EPA to ignore all these requirements.[2] The court reasoned that Section 110(c) rulemaking would be "unnecessarily duplicitous." Courts and agencies do not have the authority to ignore the express procedures required by Congress. Moreover, the "significance of rulemaking cannot be underemphasized. It gives parties affected by a decision an opportunity to participate in the decision-making process and forces EPA to articulate the bases for its decisions." *Donner Hanna Coke Corp. v. Costle*, 464 F. Supp. 1295, 1305 (W.D.N.Y. 1979). Unless the court of appeals decision is reversed by this Court, rather than follow the congressionally imposed rulemaking requirements, EPA may fundamentally change a State's regulation by simply drawing a line through a portion of that regulation thereby substituting its judgment for that of the State; oust the State of its primary role under the Act; eliminate the State's second chance to devise a regulation of its own choosing; and immediately enforce EPA's regulation without any due process whatsoever. Such a result was clearly not contemplated by Congress, and cannot be justified in light of the Act's requirements.

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[2]Only after following these mandatory procedures, may EPA substitute its judgment for the state. As pointed out at pages 18-19 of the Petition, Congress recognized that holding a public hearing in the affected state and considering, analyzing, and responding to public comments from the state, affected industries, and the general public, might result in changes to EPA's proposed regulation. These requirements are also consistent with a general theme of the Act, that no State Implementation Plan regulation, be it state or federal, can become an enforceable part of a SIP unless subjected to public notice, comment, and public hearings. 42 U.S.C. §§7410(a)(2), 7410(a)(3), 7410(c)(1) (Supp. IV 1980).

CONCLUSION

The Air Pollution Control Board of the State of Indiana, appearing by its Attorney General as *amicus curiae*, respectfully tenders this Brief in Support of Public Service Company of Indiana, Inc.'s Petition For Writ of Certiorari filed September 23, 1982. The State supports the positions presented by Petitioner, and urges this Court (1) to grant certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit herein, and (2) to reverse the Appellate Court's decision for the reasons set forth above.

Dated: October 22, 1982.

Respectfully submitted,

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